

The Role of UN Documentation in Shaping Narratives at the International Criminal Court and the Implications for the Rights of the Accused

Anne Herzberg

Legal Advisor, Institute for NGO Research, 10 Yad Harutzim Street,
Jerusalem 9342148, Israel
anne.herzberg@ngo-monitor.org

Abstract

The International Criminal Court (ICC) is an independent treaty-based international organisation acting in close cooperation with the United Nations (UN). To that end, organs of the Court have extensively relied on UN documentation in proceedings. These materials have been used to support grounds for the exercise of jurisdiction, demonstrate legal elements of crimes, and prove matters of fact. In recent practice, including in the situations of Palestine, Bangladesh/Myanmar, and Mali, UN materials have been used to establish legal and factual matters on the primary basis that they represent the ‘views of the international community’. This paper examines the ways in which Court organs rely on UN documentation in ICC proceedings. It assesses the interplay of such information with rights of the accused. The paper concludes that in order to safeguard its credibility and the fairness of the proceedings, the Court should adopt specific guidelines relating to the evaluation of and admissibility of UN materials.

Keywords

ICC – UN – evidence – admissibility – fact finding – due process

1 Introduction

The International Criminal Court (ICC) is an independent judicial body that is distinct from the United Nations (UN) system. Nevertheless, there is a close relationship between the two as expressly stated in the Preamble and eighteen articles of the Rome Statute.¹ Article 2 of the Statute mandates that the two bodies 'shall be brought into relationship.'² In December 2003, the General Assembly (UNGA) passed Resolution 58/79 inviting the Secretary General to conclude a relationship agreement with the ICC.³ In 2004, the Negotiated Relationship Agreement was entered into and approved by the UNGA.⁴ Close cooperation between both institutions is important to the functioning of the Court. To that end, organs of the Court, including both the Office of the Prosecutor (OTP) and Chambers, have extensively relied on UN documentation, including Security Council and UNGA resolutions, reports from fact-finding missions and commissions inquiry, special procedures and treaty body reporting, UNESCO world heritage designations, and statements from UN officials. These materials have been used by both the OTP and ICC judges to support grounds for the exercise of jurisdiction, demonstrate legal elements of crimes, and prove matters of fact. In recent practice, including in the situations of Palestine, Georgia, Bangladesh/Myanmar, and Mali, UN materials have been used to establish legal and factual matters on the primary basis that they represent the 'views of the international community'. This paper examines the ways in which Court organs rely on UN documentation in ICC proceedings. It first looks at the normative framework establishing information sharing between the ICC and the UN. The next section looks at standards applied at the Court for the evaluation of UN information. Part 4 offers case studies of how UN materials are relied upon in practice. The fifth part assesses the interplay of such information with concepts of due process and rights of the accused. Finally, the paper concludes that, in order to safeguard the credibility of the Court and the fairness of the proceedings at all stages, the ICC should adopt specific guidelines relating to the evaluation and admissibility of UN materials.

1 *E.g.*, Preamble: 'Determined ... to establish an independent permanent International Criminal Court in relationship with the United Nations system ...' Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, 2187 UNTS 38544. *See also* Articles 8, 15, 16, 112, 115, 117, 121–123, 125–128.

2 *Ibid.*

3 UNGA, *Resolution adopted by the General Assembly on 9 December 2003* (A/RES/58/79).

4 Assembly of State Parties, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (ICC-ASP/3/Res.1) 4 October 2004; UNGA, *Resolution adopted by the General Assembly 20 September 2004* (A/RES/58/318).

2 Information Sharing Between the ICC and the UN

In addition to a Chapter VII Security Council referral to the Court under Article 13(b) of the Rome Statute, information sharing is one of the primary ways in which the ICC and UN bodies interact. For example, Article 15bis(6)-(7) of the Rome Statute obligates the Prosecutor to rely on information from the Security Council to advance a case based on the crime of aggression. Specifically, he or she must ascertain if the Security Council has ‘made a determination of an act of aggression committed by the State concerned.’⁵ When initiating investigations proprio motu pursuant to Article 15, the Prosecutor ‘shall analyse the seriousness of information received [using] reliable sources [such as information sought from] organs of the United Nations’.⁶ A 2003 Expert meeting convened by the Court explains that pursuant to this article, ‘[t]he Prosecutor may seek assistance from [UN agencies] ... for preliminary witness identification/screening functions or other types of information that may be relevant to the assessment at this stage.’⁷ Despite this authorisation, the Rome Statute does not enumerate any specific powers for information gathering from sources listed in Article 15(2).⁸ Because there are no cooperation powers during the preliminary examination phase, Article 15(2) ‘requires a facilitative interpretation, and maximum use, of the fact-finding measures.’⁹ Much of the 2004 Negotiated Relationship Agreement¹⁰ between the ICC and the UN relates to the sharing of information and further details the manner of cooperation between the two institutions.¹¹ For instance, in Article 5(1), both bodies agree ‘to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest.’¹² Article 5(2) states that they will make every effort to avoid ‘undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of

5 *Supra* note 1, Article 15bis(6).

6 *Supra* note 1, Article 15.

7 Office of the Prosecutor (OTP), *Informal expert paper: Fact-finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation*, available online at www.legal-tools.org/doc/ba368d/pdf/ (accessed 17 June 2021), para. 30.

8 *Ibid.*

9 *Ibid.*, p. 7.

10 *Supra* note 4, Article 2.

11 *Best Practices Manual for United Nations—International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court*, available online at legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf (accessed 17 June 2021).

12 *Supra* note 4.

mutual interest'¹³ and to 'combine their efforts to secure the greatest possible usefulness and utilization of such information'.¹⁴ Under Articles 18(2)–(3), the UN agrees to cooperate with the Prosecutor's requests for information 'from organs of the UN in connection with investigations initiated proprio motu'¹⁵ and UN bodies may provide information in order to generate new evidence. Under Article 7, '[t]he Court may propose items for consideration by the UN. . . . The Secretary General shall . . . bring such item or items to the attention' of the relevant UN bodies.¹⁶ In addition, the Prosecutor may seek assistance, information, and evidence gathering from UN Peacekeepers and UN bodies operating in the field.¹⁷

3 Standards for Reliance on UN Materials in ICC Proceedings

UN documentation has been used by both the OTP and Chambers to support grounds for the exercise of jurisdiction, legal elements of crimes, and matters of fact. Beyond the authorisation of the Rome Statute and the Negotiated Relationship Agreement, it is not surprising that the organs of the ICC would seek to rely on UN materials at all stages of court proceedings. The UN is the main institution tasked with monitoring and producing reports on conflict situations around the globe, providing interpretation of human rights and other international legal instruments, and facilitating the innovation and development of international law, notably via the International Law Commission (ILC). In the Rome Statute and the Court's various regulations and policies, UN materials do not appear to be treated differently than other sources of information relied upon by the Court.¹⁸ Moreover, these rules do not make a distinction between information used to support factual claims as opposed to those relied upon for matters of law. The Regulations of the OTP specify how information,

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Informal Expert Paper, *supra* note 9, paras 77, 95. UN agencies such as UNESCO have also negotiated agreements with the ICC. For instance, 'joint cooperation between UNESCO and the ICC on the Mali case ... consisted in providing detailed documentation on cultural heritage to the ICC.' UNESCO, *Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict* (38 C/49), para. 29. An analysis of such cooperation agreements and the collection of evidence related thereto are beyond the scope of this paper.

¹⁸ See, e.g., *supra* note 1, Article 15(2); OTP, *Regulations of the Office of the Prosecutor* (23 April 2009), Regulation 25.

including UN information, should be processed. Regulation 24 mandates that the OTP 'shall develop and apply a consistent and objective method for the evaluation of sources, information and evidence',¹⁹ which includes taking into account credibility and reliability and examining 'information and evidence from multiple sources as a means of bias control'.²⁰ At the preliminary examination stage, the OTP evaluates information 'largely obtained from external sources, rather than through the Office's own evidence gathering powers'.²¹ The OTP says it will engage in independent evaluation, while paying 'particular attention to the assessment of the reliability of the source and the credibility of the information'.²² It may also seek additional information from organs of the UN.²³ The OTP must carry out its evaluation in accordance with the principles of impartiality and objectivity, meaning it should 'apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned'²⁴ and must 'investigate incriminating and exonerating circumstances equally'.²⁵ In doing so, the OTP says it uses 'standard methods of source evaluation, and consistent rules of measurement and attribution ... It checks internal and external coherence, and considers information from diverse and independent sources as a means of bias control'.²⁶ Should new information or circumstances come to light, the OTP shall analyse these communications 'in combination with open source information such as reports from the United Nations, nongovernmental organisations and other reliable sources for corroboration purposes'.²⁷ In her October 2015 request to the Pre-Trial Chamber to open an investigation in the Situation in Georgia, the Prosecutor detailed the preliminary examination information review process. In particular, she outlines a 'consistent methodology'²⁸ based on the criteria of relevance, reliability, credibility, and completeness. With regards to relevance, the OTP should look at 'usefulness of the information to determine

19 *Ibid.*, Regulation 24.

20 *Ibid.*

21 OTP, *Policy Paper on Preliminary Examinations* (November 2013), para. 31.

22 *Ibid.*

23 *Ibid.*, para. 12.

24 *Ibid.*, paras 28, 30; OTP, *Code of Conduct for the Office of the Prosecutor* (5 September 2013), para. 49(b).

25 *Ibid.*

26 *Supra* note 21, para. 32. The Office does not specify the 'standard formats' or 'methods for analytical reports and source evaluation'.

27 *Ibid.*

28 ICC, Situation in Georgia (Georgia), ICC-01/15-4, PTC, Request for authorisation of an investigation pursuant to Article 15 (13 October 2015), para. 44.

the elements of a possible future case';²⁹ reliability entails the 'trustworthiness of the provider of the information';³⁰ credibility goes to information quality measured by 'immediacy, internal consistency and external verification';³¹ and completeness relates to 'the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts'.³² The OTP also must corroborate this information with open source and other reliable material.³³ When assessing information, the OTP should take into account 'possible bias and interests from parties to the conflict'³⁴ and focus 'its examination on allegations corroborated by credible third parties.'³⁵ Similarly, in the preparation of applications for arrest warrants or summons to appear, Regulation 53 requires that the OTP 'shall clearly identify the crime(s) and mode(s) of liability alleged, based on solid factual and evidentiary foundations'.³⁶ During the confirmation hearing, the OTP must include a list of evidence that is 'sufficient, relevant and credible evidence establishing substantial grounds to believe that the person committed the crimes charged'.³⁷ Moreover, the OTP, bearing in mind the right of the defence to challenge the evidence, 'shall consider relying on documentary or summary evidence at the confirmation hearing . . . in particular when this may assist in the efficient presentation of material'.³⁸ The OTP also 'shall ensure that any summary evidence presented during the confirmation hearing ... is self-sufficient and contains a concise and objective representation of the evidence or testimony'.³⁹ In determining the sufficiency of available information, the Pre-Trial Chamber applies a reasonable grounds to believe standard pursuant to Article 58 of the Rome Statute.⁴⁰ Under this standard, it is not required that the factual conclusions reached by the OTP 'be the only possible or reasonable one[s]'.⁴¹ The Prosecutor is also not required to 'disprove any other

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.* Conversely, in the Georgian situation, the Prosecutor excluded some crimes because the information received was 'derived solely from one party to the conflict, is contradicted by information provided by the other, and no third party has been able to provide corroboration or to come to a relevant determination on the matter'. *Ibid.*, para. 46.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Supra* note 24, Regulation 59.

38 *Ibid.*

39 *Ibid.*

40 ICC, Situation in the Republic of Kenya (Kenya), ICC-01/09-19-Corr, PTC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation (31 March 2010), para. 33.

41 *Ibid.*

reasonable conclusions'.⁴² Application of the reasonable grounds standard is intended to 'prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility'.⁴³

At the trial stage, admissibility of evidence, including UN documentation, is based on

the nature and origin of documentary evidence; the relevance to the case; whether the content of the document is easily understandable; whether the information contained in the document pertains exclusively to the historical background and/or contextual elements of the case; the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or if there are alternative sources of information on the same issue; the original purpose for which the document was created and to whom it was addressed; whether it is possible to ascertain the method used to compile and process the information contained in the document; whether there are any doubts as to the authenticity of the document.⁴⁴

4 Case Studies

The next section offers several case studies of how UN materials have been used in practice in various ICC proceedings.

4.1 *Situation in Mali*

4.1.1 Al Hassan

UN documents have featured in multiple ways in the *Al Hassan* case, falling under the Situation in Mali, including to prove both factual matters and points of law. For example, in the Decision confirming the charges, UN reports, including a report of the Secretary General and a report of the High Commissioner for Human Rights were cited as evidence of sexual violence and forced marriages carried out by the armed group Ansar Dine/AQMI during the non-international

42 *Ibid.*

43 *Ibid.*, para. 32.

44 ICC, Situation in the Democratic Republic of Congo (DRC), *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, TC, Katanga Defence Response to Prosecution Bar Table Motion (30 August 2010), para. 20.

armed conflict in that country.⁴⁵ One of the main charges in the case relates to the war crime of attacks on cultural property. In confirming the charges, the PTC referred to UNESCO designation of the mausoleums in Timbuktu as a world cultural heritage site⁴⁶ to demonstrate the importance of the property to the international community.⁴⁷ In addition, it referred to statements made by UNESCO and its Director General, Irina Bokova, to demonstrate that the sites were endangered.⁴⁸ The Court also, pursuant to Article 21(3) of the Rome Statute, referred to decisions by human rights treaty bodies, in particular the Committee Against Torture, to define what acts constitute torture.⁴⁹ Reports by the Special Rapporteur on Torture and the Human Rights Committee were used to support the legal proposition that one must look to international human rights law to determine the legality of state conduct (in this case the legality of corporal punishment) rather than how acts were defined in domestic law.⁵⁰

Security Council resolutions were relied upon as a legal matter to determine whether the elements of war crimes had been met. Specifically, they were used to evaluate the intensity of the conflict.⁵¹ Notably, the Court referred to the passage of Security Council Resolution 2056 passed under Chapter VII of the UN Charter.⁵²

4.1.2 Al Mahdi

UNESCO designations also featured prominently in the *Al Mahdi* case.⁵³ For example, in its decision confirming the charges, the panel noted that cultural property at issue had been ‘classified as world heritage and thus under the protection of UNESCO’ and that on 28 June 2012, UNESCO classified all of Timbuktu as ‘world heritage in danger’.⁵⁴ In addition, UN reports were used as a legal matter to classify the armed conflict in Mali as non-international

45 ICC, Situation in the Republic of Mali (Mali), *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, PTC, Rectificatif à la Décision Relative à la Confirmation des Charges (13 November 2019), para. 566 and note 1506, para. 572.

46 *Ibid.*, para. 524.

47 *Ibid.*, para. 529.

48 *Ibid.*, para. 527.

49 *Ibid.*, paras 231, 242.

50 *Ibid.*, paras 240, 242–243.

51 *Ibid.*, para. 197.

52 *Ibid.*, para. 220 and note 578.

53 ICC, Mali, *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, PTC, Decision on the Confirmation of Charges, 24 March 2016, Introduction and paras 32–36.

54 *Ibid.*, para. 36.

in character.⁵⁵ In a dissent to the PTC's confirmation of the charges, however, Judge Kovacs expressed concern that the Majority failed to provide concrete references to 'relevant pieces of evidence'.⁵⁶ Specifically, he noted that the Majority referred to 'reports from the "UN and media" which support the existence of an armed conflict not of an international character or the major role played by the suspect to "discourage the population from following their established practices concerning the mausoleums...,"⁵⁷ but failed to describe the content of these reports. He found that this omission gave the impression that the Majority's 'reasoning rests on mere assumptions due to the lack of specific support from the evidence presented to the Chamber ... Judicial reasoning dictates that a proper account of the events and evidence presented is reflected in the Decision'.⁵⁸

4.2 *Situation in Kenya*

In the Prosecutor's request to open an investigation, reports from UN bodies and agencies (Office of the High Commissioner for Human Rights Fact Finding Mission (FFM), UNOCHA, UNICEF, UNFPA, UNIFEM, and the Special Rapporteur on extrajudicial, summary or arbitrary executions) were used to demonstrate crimes committed during the post-election violence in Kenya.⁵⁹ The Prosecutor characterised the FFM report as providing a list of human rights violations as well as analysing their context and patterns. She highlighted that the FFM conducted on-site visits and met with multiple actors in the Government, among the opposition, victims, NGOs, and diplomats.⁶⁰ This report was used to support war crimes charges of displacement, forcible transfer, and crimes against humanity because it 'identified a wave of displacements in the wake of the post-election violence'⁶¹ aimed at permanently displacing targeted communities. The Prosecutor also cited findings by the FFM identifying patterns of incitement.⁶² Agency reports from UNICEF, UNFPA, and UNIFEM were used to show humanitarian conditions on the ground and to support claims of gender-based violence.⁶³ The Prosecutor relied on a report by the

55 *Ibid.*, paras 30–31.

56 *Ibid.*, ICC-01/12-01/15-84-Anx, Separate Opinion of Judge Péter Kovács, para. 4.

57 *Ibid.*, para. 5.

58 *Ibid.*, para. 5.

59 ICC, Kenya, ICC-01/09-3, PTC, Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009.

60 *Ibid.*, para. 32.

61 *Ibid.*, paras 68, 91.

62 *Ibid.*, para. 89.

63 *Ibid.*, paras 33–35, 97–98.

Special Rapporteur stemming from his 2009 mission to Kenya to ‘ascertain the types and causes of extra-judicial killings; investigate whether those responsible for such killings are held to account; and propose constructive measures to reduce the incidence of killings and impunity’.⁶⁴ The Prosecutor emphasised that the report concluded that ‘those responsible for the post-election violence, including ... officials who organised or instigated violence, remain immune from prosecution’.⁶⁵ The PTC in turn accepted these sources of information to support a decision authorising the opening of the investigation.⁶⁶

4.3 *Situation in Bangladesh/Myanmar*

In the situation of Bangladesh/Myanmar, the Prosecutor filed for the first time an Article 19(3) request seeking authorisation of the exercise of jurisdiction for the crime of deportation. The request was made even though the relevant coercive acts occurred on the territory of a State which is not a party to the Rome Statute (Myanmar). According to the OTP’s theory of the case, an essential element of the crime occurred on the territory of Bangladesh, which is a state party to the Rome Statute, and therefore, the OTP believed it could proceed.⁶⁷ To support the factual elements of the crime and allegations that ‘attacks directed against the civilian population were well-organised, coordinated and systematic, and intended to drive the Rohingya population out of Myanmar’,⁶⁸ the OTP relied on ‘prima facie reliable sources’⁶⁹ including OHCHR, the Independent International Fact-Finding Mission on Myanmar, the Special Rapporteur on the Situation of Human Rights in Myanmar, UNHCR, and UNICEF. The OTP also referred to a quote by the High Commissioner for Human Rights describing the Rohingya situation as ‘a textbook example of ethnic cleansing’⁷⁰ and one by the UN Special Envoy for human rights in Myanmar, claiming it bears the ‘hallmarks of a genocide’.⁷¹ Another notable feature of the Prosecutor’s Article 19(3) request was that she sought to support the exercise of jurisdiction on the basis that the issues raised by the factual

64 *Ibid.*

65 *Ibid.*, para. 36.

66 *Ibid.*, para. 103.

67 ICC, Situation in Myanmar/Bangladesh (Myanmar), ICC-RC46(3)-01/18-1, PTC, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (9 April 2018), para 2.

68 *Ibid.*, para. 10.

69 *Ibid.*, para. 7.

70 *Ibid.*, para. 5.

71 *Ibid.*, para. 10.

situation, notably enforced migration, were of acute international concern.⁷² Accordingly, she pointed to the Preamble of the Rome Statute that the drafters manifestly intended to grant the Court ‘jurisdiction over the most serious crimes of concern to the international community as a whole.’⁷³ In its decision November 2019, confirming jurisdiction, the PTC significantly relied on UN documentation. Interestingly, the PTC also cited to UN documentation for facts falling outside the Court’s jurisdiction, but said these could be used to establish ‘the contextual elements of the alleged crimes’⁷⁴ falling within the jurisdiction of the Court.

4.4 *Situation in the Democratic Republic of Congo*

During the *Katanga/Chui* trial proceedings, the Prosecutor sought to enter multiple UN documents into the record as evidence.⁷⁵ These materials included eight Security Council resolutions to support the contextual elements of war crimes, specifically the existence of an armed conflict in the DRC; ten reports from UN agencies documenting human rights violations and information on individual attacks; and 23 reports from MONUC to support contextual elements of war crimes and crimes against humanity.⁷⁶ The Prosecutor claimed these materials provided contemporaneous documentation of human rights abuses ‘with the view to inform the public, as well as national and international decision-makers.’⁷⁷ The Defendants challenged the admissibility of these documents on the basis they violated the right to a fair trial, the right to examine witnesses, and the right to a public hearing. In particular, they argued a trial should not be ‘substantially based on written material that is never discussed in the public forum.’⁷⁸ Specifically, the Defendants noted that ‘Security Council Resolutions have been used sparingly in international courts’⁷⁹ and that the content of SC resolutions ‘have not been admitted due to the questionable reliability of the facts and statements contained therein.’⁸⁰ This is primarily because they represent ‘invariably a mixture of posited facts, propositions

72 *Ibid.*, para. 5.

73 *Ibid.*, para. 49.

74 ICC, Myanmar, ICC-01/19–27, PTC, Decision Pursuant to Article 15 (19 November 2019), para. 93.

75 ICC, DRC, *Katanga/Chui*, ICC-01/04-01/07-2290, TC, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute (16 July 2010), paras 24–26.

76 *Ibid.*

77 *Ibid.*, para. 28.

78 *Ibid.*, para. 8.

79 *Ibid.*, para. 18.

80 *Ibid.*

of law, and opinions'.⁸¹ UN reports, such as those produced by MONUC were contested on the basis that they contained mostly hearsay.⁸² The Defendants also challenged the claim that UN reports are prima facie reliable, stressing the Prosecutor 'must establish the reliability and probative value ...the fact that they emanate from the UN does not suffice'.⁸³ The Trial Chamber ruled that it will consider as prima facie reliable UN reports that 'emanate from independent observers who were direct observers of the facts being reported'⁸⁴ but if sufficient detail regarding the author's identity and sources were not provided, the Chamber would be unable to 'assess the reliability of the content of the reports' and admit them into evidence.⁸⁵ In addition, where 'reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned'.⁸⁶

4.5 *Situation in the Central African Republic*

In the *Bemba* case, UN documentation featured at several stages. During the confirmation of charges, the Prosecutor used a report by the Secretary General that included a statement that 'human rights violations were committed during the armed conflict at the end of October 2002'⁸⁷ to show the existence of an armed conflict per Article 8 of the Rome Statute. At the Trial phase, the Prosecutor sought to introduce four UN reports to collectively provide information on the background to the CAR armed conflict including the identities of armed groups, information on victimization of civilians, and attribution of responsibility for crimes.⁸⁸ Bemba challenged the admission noting that it was not appropriate for the 'Prosecutor to invite the Chamber to delegate its judicial function by simply accepting the facts as asserted by NGOs or other agencies as to the existence of particular events or crimes, rather than making independent findings based on the evidence heard in the courtroom'.⁸⁹ With

81 *Ibid.*

82 *Ibid.*, para. 28.

83 *Ibid.*, para. 21.

84 ICC, *Katanga/Chui*, ICC-01/04-01/07-2290, TC, Decision on the Prosecutor's Bar Table Motions (17 December 2010), para. 29.

85 *Ibid.*

86 *Ibid.*

87 ICC, Situation in the Central African Republic (CAR), ICC-01/05-01/08-26-Red, PTC, Prosecutor's Application for Warrant of Arrest under Article 58 (9 May 2008), para. 34.

88 ICC, CAR, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2147, TC, Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute (28 February 2012), para. 7.

89 ICC, *Bemba*, ICC-01/05-01/08-2168, Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table (20 March 2012), para. 6.

regards to the specific documents, the defence noted that the Prosecutor failed to identify the reports' authors, the reports failed to reveal source material with sufficient detail, and they failed to meet the standards for reliability.⁹⁰ In reply, the Prosecutor claimed that the UN reports could be considered reliable because 'they were generated contemporaneously with the events charged, and prepared by an identifiable organisation with no direct interest in the current proceedings'.⁹¹ The Prosecutor also highlighted that the Defendant himself had sought admission of UN reports that had the same alleged defects as those claimed to be offered by the Prosecution.⁹² In its decision on admissibility, the Trial Chamber observed that out of the four proffered UN reports, only one could be 'properly characterised as a UN Report';⁹³ two were copies of online publications purportedly from a UN body, and the last was an academic article published by OHCHR. One of the reports was deemed inadmissible because it fell 'outside the material, temporal, and geographical scope of the charges'.⁹⁴ Two reports were not admitted because they could not be authenticated as official UN documents.⁹⁵ With regards to the UN documents sought to be admitted by the defence, the Court granted their admission because they bore 'indicia of reliability such as letterheads, dates, signatures and stamps, and appear to have been produced in the ordinary course of operations'.⁹⁶ A subsequent 2013 decision ruled on the admissibility of a report by a UN Special Investigation Team because it specifically referred to the role of the accused and was therefore, relevant to the proceedings.⁹⁷

4.6 *Situation in the Republic of Korea*

In the examination of events relating to attacks committed in 2010 against the Republic of Korea, the Prosecutor looked at claims that the North Koreans

90 *Ibid.*, paras 19–23.

91 ICC, *Bemba*, ICC-01/05-01/08-2184, Prosecution's Reply to 'Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table' (30 March 2012), para. 17.

92 *Ibid.*, para.18.

93 ICC, *Bemba*, ICC-01/05-01/08-2299, Decision on the admission into evidence of items deferred in the Chamber's 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' (27 June 2013), para. 17.

94 *Ibid.*, para. 20.

95 *Ibid.*, para. 24.

96 *Ibid.*, para. 52.

97 A dissent was authored by Judge Ozaki objecting to the fact that only excerpts of the report were sought to be admitted rather than the entire document. *Ibid.*, ICC-01/05-01/08-2721 at paras 5.a, 12–13.

had engaged in acts of perfidy. The Prosecutor cited to the 2009 Fact Finding Mission on the Gaza Conflict for the definition of the war crime of perfidy: 'Perfidy is not always limited to incidents causing death; the Goldstone Report found instance of perfidy when a combatant enticed enemy troops to surrender by saying that the ICRC was present when they were not permitted to enter'.⁹⁸ It is interesting that the Prosecutor chose this report as the source for the definition rather than citing directly to the Geneva Conventions, commentaries, or case law.

4.7 *Situation in Georgia*

In the October 2015 request for authorisation to open an investigation, the OTP relied on UN materials for both factual⁹⁹ and legal matters. The most notable use (and perhaps as a harbinger to the OTP's subsequent request in the Situation in Palestine)¹⁰⁰ was to rely upon UNGA resolutions to demonstrate that the territory of South Ossetia/Tskhinvali was part of Georgian territory and did not constitute an independent state.¹⁰¹ Therefore, the Court could exercise jurisdiction over alleged crimes committed on Georgian territory, regardless of an accused's nationality.¹⁰² The PTC agreed with the Prosecutor in its decision.¹⁰³

4.8 *Comoros Preliminary Examination*

Like the Situation in Georgia, in the Comoros preliminary examination, the OTP relied on UNGA resolutions to support a proposition of law in lieu of in-depth legal analysis. This situation also marked the use of reference to views of the international community as a basis for asserting legal conclusions. In particular, the OTP deemed the territory of Gaza as occupied. To support this legal conclusion, in its November 2014 Article 53(1) Report, the OTP relied on two 2009 UNGA resolutions that used the terminology 'Occupied Palestinian Territory'.¹⁰⁴

98 OTP, Situation in the Republic of Korea, Article 5 Report, June 2014, para. 50.

99 Citing OCHA, UNITAR reports to show extensive pillage and property destruction of ethnic Georgian civilians. See Georgia, *supra* note 29, paras 131 and notes 166, 269, 288.

100 In the Situation in Palestine, UNGA resolutions were used to prove the existence of statehood. See Section 4.9.

101 *Ibid.*, para. 54. These resolutions do not specifically discuss the issue of statehood but rather use the phraseology of Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia.

102 *Ibid.*

103 ICC, Georgia, ICC-01/15-12, PTC, Decision on the Prosecutor's Request for Authorisation of an Investigation (27 January 2016), para. 6.

104 ICC, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report (6 November 2014), note 35.

The OTP also remarked that ‘the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement’,¹⁰⁵ introducing the concept that the views of the international community, as reflected in UNGA resolutions, could be used to substitute for conducting detailed legal analysis. To support the invoking of the concept of international community, the OTP in its report made special note of the voting record of the two UNGA resolutions.¹⁰⁶ The OTP also cited to comments made in a Presidential Statement of the UN Security Council that the ‘incident triggered concern and outrage from the international community’.¹⁰⁷ It is an interesting contrast that in the Situation in Georgia, instead of citing to a UN resolution describing the territory as occupied, the Prosecutor conducted a full legal analysis to determine the status of the territory.¹⁰⁸

4.9 *Situation in Palestine*

Unlike other Situations before the ICC, UN documentation played the decisive factor in both the Prosecutor’s determination to open an investigation and in the PTC’s confirmation of that jurisdiction. In December 2019, the Prosecutor filed an Article 19(3) Request seeking confirmation of jurisdiction in the Situation of Palestine such that she could proceed to an investigation. UN documentation was used in three ways. First, the main controversy regarding the exercise of jurisdiction related to whether Palestine could be considered a State such that it could accede to the Rome Statute.¹⁰⁹ Rather than look to the definition of state under customary international law, the Prosecutor instead relied on UNGA Resolution 67/19, which in 2012, upgraded the status of the Palestinian UN mission to that of non-member observer state.¹¹⁰ Second,

105 *Ibid.*, para. 27. Eugene Kontorovich, ‘Is the International Criminal Court biased against Israel,’ Kohelet Policy Forum, available online at en.kohelet.org.il/publication/is-the-international-criminal-court-biased-against-israel (accessed 17 June 2021).

106 Article 53(1) Report, *supra* note 104, note 35.

107 UN, *Statement by the President of the Security Council (S/PRST/2010/9)*, para. 14.

108 Georgia, *supra* note 28, para. 109.

109 The Rome Statute speaks about ‘States’.

110 ICC, Situation in Palestine (Palestine), ICC-01/18-12, PTC, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine (22 January 2020), para. 8. The OTP also relied on a memorandum of the UN Office of Legal Affairs to support its interpretation of Resolution 67/19. This reliance was challenged by several *amici* who questioned whether any steps had been taken to authenticate it and noted that there was ‘no explanation for why this resolution might be legally relevant’. International Jewish Lawyers, ICC-01/18-98-Corr, Corrigendum to ‘IJL observations on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (17 March 2020), para. 23.

the Prosecutor argued in the alternative that should the PTC engage in an independent analysis as to whether Palestine satisfied ‘the normative criteria of statehood under international law’¹¹¹ for the purposes of Article 12, it should take into consideration in its legal review, the severe impairment to the Palestinians’ right to self-determination. The Prosecutor looked to UN resolutions and other documentation that reaffirmed this right.¹¹² The Prosecutor claimed that ‘the situation in Palestine is unique and therefore not comparable to other situations [but] this approach to assessing the criteria of statehood comports with international practice.’¹¹³ The Prosecutor did not provide any source for this proposition. Third, the OTP argued that the territory over which it could exercise jurisdiction was that of the West Bank, East Jerusalem, and Gaza based ‘on the views of the international community as expressed primarily by the UN General Assembly,’¹¹⁴ because it is the ‘UN’s chief deliberative body where all member States have an equal vote.’¹¹⁵ In addition, ‘the General Assembly has consistently stressed “the need for respect for and preservation of the territorial unity, contiguity and integrity of all the Occupied Palestinian Territory, including East Jerusalem”.’¹¹⁶ Other UN bodies relied upon by the Prosecutor were statements by the Security Council, the International Court of Justice, and the Human Rights Council.¹¹⁷ The Prosecutor also relied on UN documentation for legal propositions including the status of the territory as occupied and to demonstrate factual matters (existence of human rights violations), because she asserted that ‘the Court is entitled however to rely, as a matter of fact, on the prevalent views of the international community’¹¹⁸—and such views are reflected in UN materials. In its February 2021 decision confirming the exercise of jurisdiction, the PTC’s Majority noted that regarding treaties adopting the ‘all States’ formula including the Rome Statute, the Secretary General ‘currently follows the determination’ of the UNGA.¹¹⁹ It then found that the wording of UNGA Resolution 67/19, which reaffirmed ‘the right of the Palestinian people to self-determination and to independence in their State’¹²⁰

111 Prosecution Request, *supra* note 111, para. 9.

112 *Ibid.*, para. 12.

113 *Ibid.*

114 *Ibid.*, para. 11.

115 *Ibid.*, para. 11.

116 *Ibid.*

117 *Ibid.*, paras 14–16.

118 *Ibid.*, para. 10.

119 ICC, Palestine, ICC-01/18-143, PTC, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ (5 February 2021), para. 98.

120 *Ibid.*

and accorded the Palestinians non-member observer State status was sufficient to fulfill the criteria of statehood for purposes of the Rome Statute.¹²¹ Moreover, the PTC said that the Chamber did not have authority to ‘review the outcome of the accession procedure’,¹²² nor to challenge the validity of Resolution 67/19. The Chamber added that this determination was ‘regardless of Palestine’s status under general international law’.¹²³ The Majority also cited to UNGA resolutions in order to confirm the scope of the Court’s territorial jurisdiction, noting that these documents reaffirmed the right of the Palestinian people to self-determination and to ‘independence “in their State of Palestine on the Palestinian territory occupied since 1967”’.¹²⁴ On both the accession and territorial issue, the PTC did not discuss the issue of the views of the international community, whether such views were reflected in UNGA resolutions, and whether they granted the Court an entitlement to rely on such views as a matter of fact. In a detailed 154-page dissent, Judge Kovács disagreed with both the conclusion that Palestine could be considered a state within the meaning of the Rome Statute and the geographic scope of the Court’s jurisdiction.¹²⁵ As he remarked, ‘one can hardly conclude that the Prosecutor’s main starting point—that, according to the General Assembly, Palestine *already and independently* possesses sufficient attributes of Statehood—is substantiated, even today’.¹²⁶ In particular, he criticised both the Prosecutor and the PTC for placing sole reliance on UNGA Resolution 67/19 and ignoring the many other UN materials from multiple bodies that form an ‘important network of international law instruments’.¹²⁷ He also took issue with the Prosecutor’s failure to rely on the *lex lata* relating to statehood and borders in favor of soft-law, non-binding UN documents such as UNGA resolutions and Security Council resolutions passed under Chapter VI of the UN Charter.¹²⁸ Pointedly, he expressed concern that no precedent was offered whereby a recommendation (the nature of UNGA resolutions) would ‘establish definitely and per se an international legal frontier’.¹²⁹ He highlighted the selective and one-sided nature of the resolutions relied upon by the OTP and the PTC and how they

121 *Ibid.*

122 *Ibid.*, para. 99.

123 *Ibid.*, para. 101.

124 *Ibid.*, paras 116–117.

125 ICC, Palestine, ICC-01/18-143-Anx1, Judge Péter Kovács’ Partly Dissenting Opinion (5 February 2021), para. 2.

126 *Ibid.*, para. 93.

127 *Ibid.*, para. 4.

128 *Ibid.*, para. 6.

129 *Ibid.*, para. 7.

also ignored contradictory sections of those same resolutions and a myriad of other resolutions that did not support their claims.¹³⁰ In particular, Kovács challenged the existence of ‘actual rules of international law and the actual legal approach of the UN regarding Palestine’s statehood and its territory and borders on which the Majority Decision is based.’¹³¹ Instead, the OTP’s ‘given legal background is much closer to expectations, which advocate for a more generous approach than one based on positive law’.¹³² He noted that the ‘greatest problem with this line of reasoning is that Palestine’s statehood was not at all (and is still not) a settled issue with the United Nations contrary to what the Prosecutor argues.’¹³³ On the defining of the territorial scope, Kovács remarked that ‘I cannot accept and even less understand why a Chamber should accept as given, and quasi mandatory a statement on the existence of the “territory of the State”, when as it will be shown, that it is premature to speak of a full-fledged “State”’.¹³⁴ Kovács also chastised the attribution of ‘utmost importance’ by the Prosecutor and the Majority Decision to the ‘qualification of “occupation” [in the] long series of UN resolutions’¹³⁵ and using it to ‘practically ipso facto recognise [Palestine’s] title on the occupied territory as a whole, as defined by the 1949 and 1967 armistice lines’.¹³⁶ He reiterated that such resolutions do not have binding force.¹³⁷ Similarly, he did not find references to self-determination to be ‘helpful in determining an existing and recognised legal state-boundary’.¹³⁸

5 Implications for Procedural Fairness and Rights of the Accused

Several trends emerge from the ICC practice relating to the use of UN materials. UN materials are extensively relied upon in Court proceedings at all stages by the OTP. At the preliminary stages, these materials appear to be more readily accepted by the PTC. During trial proceedings, parties can challenge the

130 *Ibid.*, paras 8–9, 98, 230–237, 289–290. Judge Kovács appended a chart to his dissent highlighting a myriad of UN materials to demonstrate that the views of the international community were actually quite different from that posited by the OTP.

131 *Ibid.*, para.12.

132 *Ibid.*

133 *Ibid.*, para. 15.

134 *Ibid.*, para. 10.

135 *Ibid.*, para. 269.

136 *Ibid.*, para. 269.

137 *Ibid.*, para. 270.

138 *Ibid.*, para. 277.

admissibility of such documents, but they will usually be viewed as prima facie reliable and will likely only be rejected if there is a question relating to authenticity or a manifest lack of relevance (outside the geographic or temporal scope). Lastly, UN materials are relied upon to prove both factual and legal matters. In some situations, UN resolutions have been used conclusively to determine the Court's jurisdiction. Nevertheless, the reliance on UN documentation is based on several debatable presumptions. These faulty premises have significant implications for credibility and fairness of the proceedings at the Court, and for the rights of the accused. The next section examines some of these concerns.

5.1 *Authority and Hierarchy of UN Documentation*

Where UN documentation is being used to establish legal propositions, such as in the situations in Georgia, Comoros, and Palestine, there is a failure to distinguish between types of UN documentation and their respective legal authority. For example, UNGA and Security Council resolutions do not have the same legal character. Security Council resolutions passed under Chapter VII of the UN Charter alone are considered legally binding.¹³⁹ In contrast, the Charter makes clear that the UNGA may make recommendations but they do not constitute hard law.¹⁴⁰ Apart from budgetary matters and establishing subsidiary organs, the UNGA 'has no legal power that affects the outside world. When it makes recommendations, these are indeed recommendations and not legally binding decisions'.¹⁴¹ As international jurist Stephen Schwebel has commented, UNGA resolutions are not 'binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise'.¹⁴² He adds that 'not a phrase of the Charter suggests that [the General Assembly] is empowered to enact or alter international law'.¹⁴³ In addition, according to the ILC Study on Customary International Law, 'the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law'.¹⁴⁴

139 S.M. Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law', 73 *American Journal of International Law* (1979) 301–309, DOI: 10.1017/S0272503700064934.

140 UN Charter Chapter IV.

141 Regional Academy of the UN, *Revitalization of the General Assembly by Reforming its Procedures* (2016), p. 6, available online at www.ra-un.org/uploads/4/7/5/4/47544571/revitalizing_the_un_general_assembly_final_draft.pdf (accessed 17 June 2021).

142 *Supra* note 139.

143 *Ibid.*

144 International Law Commission, *70th Session Report (A/73/10)*, p. 147.

5.2 *UN Materials and the Views of the International Community*

In several situations (Comoros, Myanmar/Bangladesh, Palestine), the OTP relied on UN materials to establish legal and factual propositions on the basis that they represented the views of the international community. The OTP does not provide any source that this concept has legal relevance, nor is the term defined by the Rome Statute or the OTP. The phrase ‘international community’ appears three times in the Rome statute—twice in the Preamble and once in Article 5.¹⁴⁵ In each instance, the use of the phrase is not intended to have legal effect, but is simply used to describe an international consensus surrounding the four core crimes falling under the Court’s jurisdiction (‘most serious crimes of concern to the international community’). Nowhere is the concept of views of the international community defined exclusively by UN pronouncements or reports. The invocation of ‘views of the international community’ as a stand in for legal analysis is highly problematic.¹⁴⁶ As noted by Lindberg,

It can become difficult to distinguish advocacy ... with a description of what the international community is. One might run into *soi-disant* descriptions whose purpose is actually polemical—to get people to accept a particular point of view as true.¹⁴⁷

Furthermore, views of the international community can be a direct reflection of who wields power in international politics.¹⁴⁸ This phenomenon is particularly true in relation to UNGA resolutions. As noted by Schmidt, while the ‘UN perhaps comes closest to resembling the idea of an international community, [it] does not (yet) satisfy the requirements, and expectations towards, a durable, institutionalised universal global political community’.¹⁴⁹ The reliance, therefore, on UNGA resolutions to substitute for deeper factual and legal analysis, ignores the political environment and context within which such resolutions

¹⁴⁵ See *supra* note 1, Preamble and Article 5.

¹⁴⁶ T. Lindberg, ‘Making Sense of the “International Community”’, p. 9, available online at www.cfr.org/sites/default/files/pdf/2014/01/IIGG_WorkingPaper14_Lindberg.pdf (accessed 17 June 2021). See also D.R. Schmidt, ‘The International Community: Conceptual Insights from Law and Sociology’, available online at www.e-ir.info/2015/11/27/the-international-community-some-conceptual-insights-from-law-and-sociology/ (accessed 17 June 2021).

¹⁴⁷ Lindberg *supra* note 146, p. 12. See also H. Karcic, ‘Why an “International Community” Does Not Exist’, *Newsweek* (18 May 2021), available online at www.newsweek.com/why-international-community-does-not-exist-opinion-1592237 (accessed 17 June 2021), noting that ‘When instrumentalised, the term international community is used tactically to bolster a given policy position and provide it with a universalist imprimatur.’

¹⁴⁸ Lindberg, *supra* note 146, p. 13.

¹⁴⁹ Schmidt, *supra* note 146.

are drafted and passed. For example, UN voting is often the product of the bloc system. Since the 1960s, the UNGA has been heavily dominated by three overlapping blocs of countries—the Organisation for Islamic Cooperation (OIC, 56 countries), the Non-Aligned Movement (NAM), and the Group of 77 (originally 77 countries, today 135).¹⁵⁰ During the Cold War, the NAM grew to more than 100 countries and could ensure the success or failure of any UNGA resolution.¹⁵¹ By 1971, the Group of 77 constituted two-thirds of the Assembly's membership.¹⁵² As a result, this group constitutes an automatic majority and can pass any vote at the UNGA.¹⁵³ In addition, the Soviet Union exercised considerable influence in driving the agenda and debate, pressured political blocs and disrupted or obstructed consensus positions, impacting the number and wording of many resolutions.¹⁵⁴ Criticism of a country, therefore, may not reflect any legal or factual truth, but rather represents the 'act of powerful blocs against countries unable to defend themselves in the UN context'.¹⁵⁵ Moreover, country votes do not necessarily signify agreement with every aspect of a resolution or capture what motivated a vote.¹⁵⁶ Votes also may be acquired through horse trading.¹⁵⁷ As noted by the ILC,

because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other nonlegal considerations, ascertaining acceptance as law (*opinio juris*) from such resolutions must be done "with all due caution".¹⁵⁸

¹⁵⁰ S. Pal, 'The Group of 77 in a Changing World,' *UN Chronicle*, available online at www.un.org/en/chronicle/article/group-77-changing-world (accessed 18 June 2021).

¹⁵¹ US Department of State, *Report to Congress on Voting Practices in the United Nations* (1985), p. 8.

¹⁵² J. Katz Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016).

¹⁵³ D.P. Moynihan, 'The United States in Opposition,' *Commentary Magazine* (March 1975), available online at <https://www.commentary.org/articles/daniel-moynihan/the-united-states-in-opposition/>; D.P. Moynihan, *A Dangerous Place* (University of California Press, Berkeley, CA, 1978).

¹⁵⁴ Report to Congress, *supra* note 151, pp. 8–9; Moynihan, *A Dangerous Place*, *supra* note 153.

¹⁵⁵ *Ibid.*, p. 9.

¹⁵⁶ For example, as noted by Judge Kovács in his dissent, many of the countries that voted in favor of Resolution 67/19 did not believe Palestine legally constituted a state, but nevertheless, voted for 67/19 in order to show their support for the Palestinians.

¹⁵⁷ Report to Congress, *supra* note 151, p. 20; Revitalizing the General Assembly, *supra* note 141.

¹⁵⁸ ILC Report, *supra* note 144, p. 147.

As noted by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, 'it is necessary to look at [a resolution's] content and the conditions of its adoption'.¹⁵⁹ The ILC notes that one should review 'the debates and negotiations leading up to the adoption of the resolution, explanations of vote, and degree of support'.¹⁶⁰ Reliance on a simple majority vote is also problematic. An expression of a view held by the majority does not necessarily mean that view is correct legally, factually, or historically, and may discount valid minority opinion.¹⁶¹ In addition, this reliance overlooks the significant power imbalance that exists within UN frameworks and how it can prevent the tabling of resolutions on many issues. Given that resolutions are a primary mechanism through which rapporteurs, fact finding missions, and reports are commissioned, the blocs can control the amount and type of monitoring and reporting that can take place on any given situation. An absence of resolutions and reporting may leave many situations outside the attention of the OTP or hamper the OTP's ability to proceed to an investigation due to a lack of information. Conversely, these power dynamics can lead to a situation where there is information that is heavily skewed to the narrative of one party to a conflict, making it difficult for other parties to challenge the dominant discourse.¹⁶² Similar trends are present at other UN agencies such as UNESCO, and in particular, regarding world heritage designations that can revolve around highly sensitive and competing, but equally legitimate, cultural and historical narratives.¹⁶³ As noted by scholar Oumar Ba, world heritage warnings and designations often relate to sites that have different meanings to different actors and questions arise as to who has the legitimacy to challenge these decisions.¹⁶⁴ Moreover, international organisations like UNESCO are often concerned with their own image and priorities and these motivations may not align with those

159 *Ibid.*, citing ICJ ('several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an opinio juris on the illegality of the use of such weapons').

160 *Ibid.*

161 See *supra* note 139, p. 307.

162 For example, at the UNGA and the UNHRC, there are a fixed number of resolutions relating to Israel that are automatically tabled at each session. C. David Welch, US State Department, 'Testimony Before the House International Relations Committee' (July 1999), available online at [1997-2001.state.gov/policy_remarks/1999/990714_welch_un-israel.html](https://2001.state.gov/policy_remarks/1999/990714_welch_un-israel.html) (accessed 18 June 2021).

163 E.g., OTP, ICC *Policy on Cultural Heritage* (June 2021).

164 *Ibid.*

of affected local communities.¹⁶⁵ Nevertheless, such designations can provide international prestige, access to international funding, and increased tourism and development, ‘despite the overt politicization of that process.’¹⁶⁶ Finally, Ba points out that as seen in the Situation in Mali, there was a convergence of interests between the ICC and UNESCO, where both institutions were seeking to establish credibility and legitimacy and this may have impacted the reliance of the ICC on UNESCO in the case.¹⁶⁷

5.3 *UN Fact-Finding Missions and Commissions of Inquiry*

Situations before the ICC are also frequently the subject of UN fact-finding missions and commissions of inquiry, and their resulting reports are often relied upon by the OTP and submitted into evidence. Per Court standards (see Section 3), these documents are generally viewed as prima facie reliable. Nevertheless, many scholars have raised concerns regarding the reliability of these reports and suggest that both the OTP and Chambers should take a closer examination prior to utilizing or admitting them into the case record. Bassiouni was one of the first scholars to take a close examination of the methodologies and practices of UN fact-finding missions.¹⁶⁸ As initial matter, Bassiouni notes the inherently political character of the UN and that its human rights frameworks function systemically as a ‘political process.’¹⁶⁹ Frequently, many mission reports are ‘designed to please influential Geneva-based’¹⁷⁰ NGOs and governments. He cautions that ‘[t]his reality, more than anything else, impacts upon the effectiveness and impartiality of fact-finding missions.’¹⁷¹ With regards to methodology, writing in 2001, ‘after fifty years, there is no standard operating procedure for fact-finding missions’.¹⁷² In 2015, OHCHR issued ‘Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian

165 ‘Protection of Cultural Heritage at the International Criminal Court’, 9 *Bedford Row International Criminal Law Webinar Series* (26 May 2021), available online at www.youtube.com/watch?v=Ei3G_5Jnw2c (accessed 17 June 2021).

166 O. Ba, ‘Contested Meanings: Timbuktu and the prosecution of destruction of cultural heritage as war crimes’, 63(4) *African Studies Review* (2020) 743–762, 746, DOI:10.1017/asr.2020.16.

167 *Supra* note 165.

168 M.C. Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’, 5 *Washington University Journal of Law and Policy* (2001) 35–49. See also B.G. Ramcharan (ed.), ‘Introduction to the Original Edition’ in *International Law and Fact-Finding in the Field of Human Rights* (Brill, Leiden, 2014), p. xix.

169 Bassiouni, *supra* note 168, p. 38.

170 *Ibid.*, p. 40.

171 *Ibid.*

172 *Ibid.*

Law: Guidance and Practice'.¹⁷³ It is unknown, however, if these guidelines are required to be followed by UNHRC-appointed fact-finding missions and if they are implemented in practice. It is also unknown to what standards, if any, missions falling under the auspices of the Secretary General or other UN agencies are required to adhere. Evaluating their actual work, Bassiouni identifies that fact-finding missions 'seldom have the resources or the ability to do effective field work or empirical research. Consequently, they rely heavily on the NGOs, government reports, and the media'.¹⁷⁴ In many cases, members 'produce reports even though they never set foot in the territory where their investigation takes place'.¹⁷⁵ Echoing Bassiouni's critique, University of Leiden Professor Dov Jacobs, analyzing the reliance on UN fact-finding reports in the Article 19(3) request to open an investigation in Myanmar/Bangladesh, notes that neither the OTP request nor the PTC decision 'shed meaningful insight as to how the reliability and credibility of such reports were assessed'.¹⁷⁶ He finds that not only does this raise methodological concerns, but that it 'leads to the wholesale adoption of a one-sided narrative about the complex events that took place in Myanmar'.¹⁷⁷ He also identifies four methodological constraints impacting the quality of these reports: insufficient time, lack of access to relevant information, risk of bias, and inability to assess and verify sources.¹⁷⁸ Other problems with UN fact finding can include the lack of expertise, particularly the lack of IHL or military expertise. Finally, it is important to recognise that UN fact-finding reports are aimed at fulfilling a very different purpose than that of an international criminal tribunal like the ICC. As noted by Professor William Schabas, these reports are geared towards 'sound[ing] the alarm and alert[ing] public opinion at a political level'.¹⁷⁹ Because these missions apply a different standard of evidence than criminal courts and rely extensively on hearsay, viewing these bodies as collectors of evidence shifts matters to 'dangerous ground'.¹⁸⁰

173 OHCHR, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law* (2015), available online at www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf (accessed 22 August 2021).

174 Bassiouni, *supra* note 168, p. 42.

175 *Ibid.*

176 D. Jacobs, 'Limitations of Using Fact-Finding Reports in Criminal Proceedings: The Case of Myanmar', *Torkel Opsahl Academic EPublisher Policy Brief Series No. 118* (2020), p. 1.

177 *Ibid.*

178 *Ibid.*, Sections 4–4.3

179 'The Influence of the Narrative in International Criminal Trials,' 9 *Bedford Row International Criminal Law Webinar Series* (1 February 2021), available online at www.youtube.com/watch?v=APHfqv4Sz_0 (accessed 18 June 2021).

180 *Ibid.*

5.4 *Prejudice to the Accused*

The reliance on UN documentation can potentially raise concerns of prejudice for an accused. In particular, introduction of UN-based evidence at preliminary stages of ICC proceedings is a potential way to backdoor prejudicial information into the record because the reasonable basis standard is low, it does not require complex or detailed analysis and information is not expected to be comprehensive or conclusive.¹⁸¹ This is all the more problematic when such documentation is used as a basis to confer jurisdiction as a legal matter. Moreover, once a UN document has been included as part of the case record at a preliminary stage, it could be difficult for a defendant to challenge its credibility or reliability during the confirmation of charges or trial stage. Other concerns include that the UN documentation relied upon may be years or decades old making it extremely difficult, if not impossible, to challenge its validity. In many cases, UN materials often contain generalised information relating to a conflict situation, but that might not be specifically relevant to the defendant, harming the presumption of innocence. The issue of funding of and cooperation with the ICC must also be raised. According to officials in the OTP, the Court is already handling cases beyond its capacity and ‘beyond the breaking point’.¹⁸² They also have said that they will act opportunistically where the evidence warrants and therefore may investigate and prosecute only one side of a conflict.¹⁸³ This means that as a cost-saving measure, the OTP might be motivated to rely on UN documentation, rather than expend resources to conduct a more thorough investigation.¹⁸⁴ This also may implicate the obligation of the OTP to look for exculpatory evidence. Similarly, this course might be chosen where the OTP does not have access to the territory under investigation or the ability to compel production of evidence. This is an increasing problem as the ICC tackles a larger number of situations involving non-cooperative states’ parties or non-states’ parties.

181 See Section 3.

182 ‘Roundtable on Prosecutorial Discretion at the International Criminal Court,’ *Leuven Centre for Global Governance Studies* (9 March 2021), available online at www.youtube.com/watch?v=mJInpQxjqE (accessed 18 June 2021).

183 *Ibid.*

184 A. Kler, ‘A Critical Analysis of the Position of Hearsay Evidence in the ICC,’ *SSRN E Journal* (17 May 2013) (‘Since the prosecution does not have access to the best evidence it may need to compensate by bringing evidence of a less direct nature.’), available online at ssrn.com/abstract=2280287 (accessed 18 June 2021), DOI:10.2139/ssrn.2280287.

6 Conclusion

The ICC and the UN are inextricably linked, and UN materials will continue to feature in ICC proceedings. ICC investigations are complex, requiring significant evidence that can be difficult to obtain. UN information, therefore, is an easy and inexpensive means of obtaining potential evidence. It would be unrealistic also to suggest, that the Court should not use such readily available open source information. Nevertheless, reliance on UN material raises significant concerns regarding fairness and efficiency of the proceedings. Currently, the Rome Statute, OTP regulations, rules of evidence, and court decisions do not provide enough specificity regarding how UN information should be evaluated and admitted into evidence. In particular, the Court must pay greater attention to the context within which UN information is generated and the unique problems surrounding this material. Providing more detailed regulations would lead to better Court jurisprudence, facilitate more effective preliminary examinations, investigations, and trials, and improve the ICC's credibility. Greater evaluation and regulation of reliance on UN materials would improve the credibility of the Court and temper efforts to instrumentalise it. It would also help to insulate the ICC from accusations of bias and promoting one-sided narratives. Reliance on UN materials is part of a growing 'universalist' trend in international criminal justice and at the ICC.¹⁸⁵ And recent practice, such as in the *Situation in Palestine*, suggests the ICC is actively transforming previous conceptions of certain UN documentation as soft law into hard law. It will be interesting to see how the new Prosecutor Karim Khan, sworn in on 16 June 2021, will approach the use of UN information as he moves forward in his tenure.

Acknowledgement

The author wishes to thank Joshua Kern and Naftali Balanson for their comments and editorial assistance.

185 Keynote address of Nancy Combs, JustSites International Conference on Transforming Evidence and Proof in International Criminal Trials, iCourts, Copenhagen University, 22 April 2021.