

# The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations

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## Abstract

*Atrocity crimes rage today in Iraq, Syria, Myanmar, Burundi and Yemen. Given their potential to establish facts and promote accountability, recently opened United Nations investigations of international law violations in each of these states are thus a welcome, even if belated, development. However, these initiatives prompt questions about their designs, both in isolation and relative to each other. This article describes the investigations into alleged violations in these five states, examines their respective sponsors and scopes, and presents a wide range of questions about the investigations and their implications, including their coordination with each other and their use of evidence in domestic, foreign, hybrid and international courts (such as the International Criminal Court). The article concludes that, while seeking accountability for international law violations is certainly laudatory, these particular investigations raise significant questions about achieving that goal amidst rampant human rights abuses in these five states and beyond. International lawyers, atrocity crime survivors and other observers thus await answers before assessing whether these investigations will truly promote justice.*

## 1. Introduction

Atrocity crimes rage today in Iraq, Syria, Myanmar, Burundi and Yemen. Given their potential to establish facts and promote accountability,<sup>1</sup> recently opened

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1 See T. Piccone, *U.N. Human Rights Commissions of Inquiry: The Quest for Accountability*, Brookings Institution, December 2017, available online at <https://www.brookings.edu/wp-content/uploads/2017/12/fp.20171208.un.humanrights.commissions.inquiry.pdf> (visited 12 December 2017), at 1.

United Nations (UN) investigations of international law violations in each of these states are thus a welcome, even if belated, development. However, these initiatives prompt questions about their designs, both in isolation and relative to each other. This article describes the investigations into alleged violations in these five states, examines their respective sponsors and scopes, and presents a wide range of questions about the investigations and their implications, including their coordination with each other and their use of evidence in domestic, foreign, hybrid and international courts (such as the International Criminal Court (ICC)).

## 2. Recent UN Investigations

This part describes recent, ongoing UN investigations in Iraq, Syria, Myanmar, Burundi and Yemen. The mechanisms and contexts for each state differ, as will be examined in the following sections.

### A. Iraq

On 21 September 2017, the United Nations Security Council (UNSC) unanimously passed Resolution 2379 to pursue accountability for atrocity crimes perpetrated in Iraq by the Islamic State (also known as ISIS, ISIL, Daesh and Daesh).<sup>2</sup> The UK is credited with drafting the resolution and providing approximately \$1.3 million to set up the investigative team.<sup>3</sup> The United States contributed to the drafting process.<sup>4</sup> The resolution requests the UN Secretary-General (UNSG)

to establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold ISIL (Daesh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Daesh) in Iraq ... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.<sup>5</sup>

Many have praised the UNSC's initiative. US Ambassador to the UN Nikki Haley called the resolution 'a landmark' in 'demonstrating that justice is never

2 SC Res. 2379, 21 September 2017. Also see, B. Van Schaack, 'The Iraq Independent Investigative Team and Prospects for Justice for the Yazidi Genocide', in this issue of the *Journal*.

3 M. Nichols, 'U.N. Team to Collect Evidence of Islamic State Crimes in Iraq', *Reuters*, 21 September 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/u-n-team-to-collect-evidence-of-islamic-state-crimes-in-iraq-idUSKCN1BW26J> (visited 12 December 2017).

4 Nikki Haley, US Permanent Representative to the United Nations, Explanation of Vote Following the Adoption of UN Security Council Resolution 2379 on Accountability for ISIS Atrocities, 21 September 2017, available online at <https://usun.state.gov/remarks/7988>; visited 12 December 2017 (hereafter Haley Explanation).

5 SC Res. 2379 § 2.

beyond reach, that no victim is voiceless, and that no perpetrator is above the law.<sup>6</sup> International human rights attorney Amal Clooney, who represents Yazidi (also known as Yezidi) victims of ISIS atrocity crimes, stated that the resolution is ‘a huge milestone for all those who’ve been fighting for justice for victims of crimes committed by ISIS.’<sup>7</sup> Iraqi Foreign Minister Ibrahim al-Jaafari declared the development ‘a victory for justice, a victory for humanity, and a victory for the victims.’<sup>8</sup>

The desirability of such an investigative team is well understood. ISIS has perpetrated widespread and systematic murder, kidnapping, sexual violence (including forced marriage and sexual slavery) and destruction of cultural heritage.<sup>9</sup> The US State Department characterized ISIS’s acts as ‘genocide’ and ‘crimes against humanity,’<sup>10</sup> and the US House of Representatives voted unanimously to do the same.<sup>11</sup> The European and Scottish Parliaments, the UK and Canadian Houses of Commons, the French Senate and National Assembly, the Iraqi and Kurdish Regional governments, and the UN’s Independent International Commission of Inquiry on the Syrian Arab Republic (Syria COI) all similarly concluded that ISIS has committed genocide.<sup>12</sup>

6 Haley Explanation, *supra* note 4.

7 J. Pelitz, ‘UN Votes to Help Iraq Collect Evidence Against Islamic State,’ *Associated Press*, 21 September 2017, available online at <https://apnews.com/6bfacfeebae43f3b806b754b574a229> (quoting Clooney).

8 *Ibid.* (quoting al-Jaafari).

9 See e.g. N. Kikoler (U.S. Holocaust Mem’l Museum Simon-Skjodt Ctr. for the Prevention of Genocide), ‘Our Generation is Gone: The Islamic State’s Targeting of Iraqi Minorities in Ninewa (2015),’ available online at <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>; UN Office of the Special Representative on Sexual Violence in Conflict, *Three Years After ISIL’s Attacks on Sinjar, Iraq, United Nations Special Representative of the Secretary-General, on Sexual Violence in Conflict, Pramila Patten, Demands Justice and Support for the Victims* (2017), available online at <https://reliefweb.int/report/iraq/three-years-after-isil-s-attacks-sinjar-iraq-unesco-nations-special-representative>; ‘Iraq’s Heritage Needs Protection from Islamic State – UNESCO,’ *Reuters*, 2 November 2014, available online at <https://www.reuters.com/video/2014/11/02/iraqs-heritage-needs-protection-from-isl?videoId=346781460>; ‘ISIS Fast Facts,’ *CNN.com*, 24 August 2017, available online at <http://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html> (websites visited 12 December 2017).

10 John Kerry, US Secretary of State, *Remarks on Daesh and Genocide*, 17 March 2016, available online at <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>; Rex W. Tillerson, US Secretary of State, *Remarks on the 2016 International Religious Freedom Annual Report*, 15 August 2017, available online at <https://www.state.gov/secretary/remarks/2017/08/273449.htm> (websites visited 12 December 2017).

11 H.Con.Res. 75, 114th Cong. (2016).

12 Genocide Recognition, Yazda, at <https://www.yazda.org/the-recognition/>; Independent International Commission of Inquiry on the Syrian Arab Republic, ‘“They Came to Destroy”: ISIS Crimes Against the Yazidis’, UN Doc. A/HRC/32/CRP.2, 15 June 2016, available online at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoSyria/A.HRC.32.CRP.2.en.pdf> (hereafter Syria COI 2016 Report); J. Moore, ‘European Parliament Recognizes ISIS Killing of Religious Minorities as Genocide,’ *Newsweek*, 4 February 2016, available online at <http://www.newsweek.com/european-parliament-recognizes-isis-killing-religious-minorities-genocide-423008> (websites visited 12 December 2017).

## B. Syria

In March 2011, as part of the Arab Spring, anti-government protests erupted in Syria. President Bashar al-Assad's regime responded violently, and armed opposition groups fought back. All parties to the conflict have been accused of international law violations. Approximately a half-million people have been killed and more than 11 million have been displaced (over five million as refugees and over six million as internally displaced persons). Amnesty International, Mercy Corps, and others have called Syria 'the worst humanitarian crisis of our time'.<sup>13</sup>

On 22 August 2011, the UN Human Rights Council (UNHRC) established the Syria COI to

investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.<sup>14</sup>

The Syria COI has recommended that the UNSC refer the situation to the ICC.<sup>15</sup>

More recently, on 21 December 2016, the UN General Assembly (UNGA) created the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).<sup>16</sup> Some experts, such as Harvard Law School Professor Alex Whiting<sup>17</sup> and Human Rights Watch (HRW) Senior International Justice Counsel Balkees Jarrah,<sup>18</sup> have noted that such a UNGA mechanism for investigating atrocity crimes is unprecedented.

## C. Myanmar

For decades, ethnic Rohingya Muslims have faced discrimination and violence in Myanmar, particularly in Rakhine State. A recent spate of violence by the

13 For background on human rights violations in Syria, see e.g. US Department of State, *Country Reports on Human Rights Practices for 2016: Syria* (2017), available online at <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265520>; Mercy Corps, *Quick Facts: What You Need to Know about the Syria Crisis*, 23 October 2017, available online at <https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>; Amnesty International, *Syria: The Worst Humanitarian Crisis of our Time*, 7 April 2015, available online at <https://www.amnesty.org/nz/syria-worst-humanitarian-crisis-our-time> (websites visited 12 December 2017).

14 Human Rights Council Res. S-17/1, UN Doc. A/HRC/S-171, 22 August 2011.

15 Syria COI 2016 Report, *supra* note 12, at 1.

16 GA Res. 71/248, 21 December 2016, at § 4.

17 A. Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach', 15 *Journal of International Criminal Justice* (2017) 231, at 232.

18 Human Rights Watch, 'Syria: UN General Assembly Adopts Resolution on War Crimes Investigations', 21 December 2016, available online at <https://www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution-war-crimes-investigations> (visited 12 December 2017) (quoting Jarrah).

Burmese government has led hundreds of thousands of Rohingya to flee to neighbouring Bangladesh. This mass exodus has been calculated to be the most rapid from any state since the 1994 genocide in Rwanda. Some officials and experts—including US Senator Ben Cardin, the US Senate Foreign Relations Committee's Ranking Member—have characterized the Myanmar military's atrocity crimes against the Rohingya as 'ethnic cleansing' and even 'genocide'. Nobel Peace Prize laureate Aung San Suu Kyi, the country's state counsellor and de facto leader, has been complacent and, arguably, complicit in these heinous offences.<sup>19</sup>

On 24 March 2017, the UNHRC adopted a two-pronged resolution on Myanmar. First, the UNHRC 'urgently' dispatched an independent international fact-finding mission (FFM) appointed by the UNHRC's President to investigate 'the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State'. The resolution requested the FFM to present to the UNHRC an update at its thirty-sixth session (in September 2017) and a full report at its thirty-seventh session (in March 2018). Second, the UNHRC extended the mandate of the Special Rapporteur on the situation of human rights in Myanmar, first established in 1992 and extended annually, for yet another year. Through this resolution, the UNHRC called upon the Myanmar government to cooperate with both the FFM and the Special Rapporteur.<sup>20</sup>

Six weeks later, Aung San Suu Kyi stated that she and others in the Myanmar government 'do not agree' with the UN's investigation of the state, explaining: 'We have disassociated ourselves from the [UNHRC] resolution because we do not think that the resolution is in keeping with what is actually happening on the ground.'<sup>21</sup> In June 2017, Aung San Suu Kyi blamed the FFM

19 For background on human rights violations in Myanmar, see e.g. Z.D. Kaufman, 'Give the Nobel Peace Prize Posthumously', *Foreign Policy*, 5 October 2017, available online at <http://foreignpolicy.com/2017/10/05/give-the-nobel-peace-prize-posthumously/>; 'The Rohingya Refugee Crisis is the Worst in Decades', *Economist*, 21 September 2017, available online at <https://www.economist.com/blogs/graphicdetail/2017/09/daily-chart-13>; M. Specia, 'How Years of Strife Grew Into a Rohingya Crisis', *New York Times*, 14 September 2017, at A6; Press Release, U.S. Senator Ben Cardin, Cardin Labels Burmese Rohingya Crisis 'Genocide', Presses Administration for Answers, 24 October 2017, available online at <https://www.cardin.senate.gov/newsroom/press/release/cardin-labels-burmese-rohingya-crisis-genocide-presses-administration-for-answers> (websites visited 12 December 2017).

20 Human Rights Council Res. 34/22, UN Doc. A/HRC/34/22, 3 April 2017; see also Human Rights Council Res. 34/L.8, UN Doc. A/HRC/34/L.8/Rev.1, 22 March 2017; United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Decides to Dispatch a Fact-Finding Mission to Myanmar to Establish Facts on Violations, Especially in Rakhine State*, 24 March 2017, available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E>; United Nations Office of the High Commissioner for Human Rights, *Special Rapporteur on the Situation of Human Rights in Myanmar*, available online at <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx> (websites visited 12 December 2017).

21 'Aung San Suu Kyi Rejects UN Inquiry into Crimes Against Rohingya', *Guardian*, 2 May 2017, available online at <https://www.theguardian.com/world/2017/may/03/aung-san-suu-kyi-rejects-un-inquiry-into-crimes-against-rohingya> (visited 12 December 2017).

for creating 'greater hostility between the different communities' in Myanmar; other officials in Myanmar also declared that their government would refuse to grant entry visas for the FFM's members.<sup>22</sup>

While the UN pursued its own investigation, two commissions initiated by the Myanmar government itself published their own findings in August 2017. On 8 August, the Investigation Commission for Maungdaw in Rakhine State published a summary of its final report, which either rejected allegations outright or stated that further investigation was required. Two weeks later, the Advisory Commission on Rakhine State, chaired by former UNSG Kofi Annan, published its final report, which did not investigate human rights violations but did recommend measures to address structural issues undermining prospects for peace, justice and development in Rakhine State.<sup>23</sup> Neither of these two commissions has adequately documented the massive human rights violations perpetrated against the Rohingya.<sup>24</sup>

On 19 September 2017, during the UNHRC's thirty-sixth session, Marzuki Darusman delivered his first address to the UNHRC in his capacity as the FFM's chair. He stated that the FFM decided to focus on events since 2011, when a ceasefire in northern Myanmar broke down and inter-ethnic tensions heightened, leading to large-scale violence in the region in 2012. He summarized alleged human rights violations in Myanmar and requested that the government grant him and other members of the FFM access to Myanmar's territory in order to investigate properly. Darusman also urged the Myanmar government to release the full final report of the 'Investigation Commission for Maungdaw in Rakhine State' so that the FFM could assess its work. In addition, Darusman stated that, given the escalating situation, it was unlikely that the FFM would be able to fulfil its mandate by March 2018.<sup>25</sup>

#### D. Burundi

Since Pierre Nkurunziza's controversial decision in April 2015 to run for a third term as president of Burundi, hundreds of people there have been killed, thousands have been arbitrarily imprisoned, and hundreds of thousands have fled

22 'Myanmar Refuses Visas to UN Team Investigating Abuse of Rohingya Muslims', *Guardian*, 30 June 2017, available online at <https://www.theguardian.com/world/2017/jun/30/myanmar-refuses-visas-un-abuse-rohingya-muslims>; Human Rights Watch, 'UN: Myanmar's Threat to Block Fact-Finding Mission', 3 August 2017, available online at <https://www.hrw.org/news/2017/08/03/un-myanmars-threat-block-fact-finding-mission> (websites visited 12 December 2017).

23 Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine* (2017), available online at <http://www.rakhinecommission.org/the-final-report/> (visited 12 December 2017).

24 See e.g. 'Myanmar may be Seeking to Expel All Rohingya, Says UN', *Guardian*, 13 March 2017, available online at <https://www.theguardian.com/world/2017/mar/14/myanmar-may-be-seeking-to-expel-all-rohingya-says-un> (visited 12 December 2017).

25 Human Rights Council 36th Session, 19 September 2017 (statement of Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar), available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22099&LangID=E> (visited 12 December 2017).

to neighbouring states.<sup>26</sup> On 25 April 2016, the ICC opened a preliminary examination into the situation in Burundi dating back to the previous April.<sup>27</sup> (Burundi had ratified the ICC's underlying treaty, the Rome Statute, in 2004.<sup>28</sup>)

On 30 September 2016, the UNHRC established the Commission of Inquiry on Burundi (Burundi COI), with a one-year mandate, to investigate 'human rights violations and abuses in Burundi since April 2015'. The UNHRC directed the Burundi COI to present oral briefings at its thirty-fourth (in February to March 2017) and thirty-fifth (in June 2017) sessions, and a final report at its thirty-sixth session (in September 2017). Through this resolution, the UNHRC called upon the Burundi government to cooperate with the Burundi COI. Burundi, which was serving on the UNHRC at the time, voted against the resolution.<sup>29</sup> The following month, Burundi announced its decision to withdraw from the Rome Statute.<sup>30</sup>

Just under a year later, on 19 September 2017, the chair of the Burundi COI, Fatsah Ouguerouz, presented his final report to the UNHRC, stating the Commission's belief 'that serious human rights violations and abuses have been committed in Burundi since April 2015 and that some are continuing to this day', including 'arbitrary arrests and detention, acts of torture and cruel, inhuman or degrading treatment, extrajudicial executions, enforced disappearances, rape and other acts of sexual violence'. Ouguerouz accused the Burundian National Intelligence Service, police, and army, as well as armed opposition groups, of committing human rights abuses. Moreover, Ouguerouz reported the Burundi COI's contention that some of the human rights violations constitute crimes against humanity. The Burundi COI compiled a partial list of alleged perpetrators of these atrocity crimes, provided it to the UN High Commissioner for Human Rights, and recommended that the ICC open an investigation into possible crimes against humanity committed in Burundi since April 2015. Ouguerouz lamented the lack of cooperation

26 For background on human rights violations in Burundi, see e.g. Human Rights Watch, *Burundi: Abductions, Killings, Spread Fear*, 25 February 2016, available online at <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear>; B. Jeannerod, *Burundi, A Country of Fear and Violence*, Human Rights Watch, 22 November 2016, available online at <https://www.hrw.org/news/2016/11/22/burundi-country-fear-and-violence>; N. Cumming-Bruce, 'Burundi Leaders Faulted in Crimes on Humanity', *New York Times*, 5 September 2017, at A9; United Nations Refugee Agency, *Number Fleeing Burundi to Neighbouring Countries Tops 300,000*, 23 September 2016, available online at <http://www.unhcr.org/en-us/news/latest/2016/9/57e535d26/number-fleeing-burundi-neighbouring-countries-tops-300000.html> (websites visited 12 December 2017).

27 International Criminal Court, *Burundi*, <https://www.icc-cpi.int/burundi> (visited 12 December 2017) (hereafter ICC-Burundi).

28 *Ibid.*

29 Human Rights Council Res. 33/24, UN Doc. A/HRC/RES/33/24, 5 October 2016; see also United Nations Office of the High Commissioner for Human Rights, *Commission of Inquiry on Burundi*, available online at <http://www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/CoIBurundi.aspx> (visited 12 December 2017).

30 'Burundi Notifies U.N. of International Criminal Court Withdrawal', *Reuters*, 26 October 2016, available online at <https://www.reuters.com/article/us-burundi-icc/burundi-notifies-u-n-of-international-criminal-court-withdrawal-idUSKCN12Q287> (visited 12 December 2017).

from Burundi, a member of the UNHRC, including that Burundi refused to grant Commission members access to its territory.<sup>31</sup>

Nine days later, on 28 September, the UNHRC decided to dispatch a three-person team of experts to investigate human rights violations in Burundi.<sup>32</sup> The following day, the UNHRC extended the Burundi COI's mandate for another year. Burundi, still a member of the UNHRC, voted against this resolution as well.<sup>33</sup> Burundi opposes the Commission's existence and operation, rejects its report of 19 September 2017, and resists cooperating with the UNHRC.<sup>34</sup>

As planned, on 27 October, Burundi's withdrawal from the Rome Statute took effect, making Burundi the first state to formally pull out of the ICC.<sup>35</sup> As was revealed later, two days before Burundi's withdrawal, the ICC authorized an investigation in the state during the relevant period while it was still a member of the Court: from 26 April 2015 until 26 October 2017.<sup>36</sup>

### E. *Yemen*

Since 2014, when civil conflict erupted in Yemen, and 2015, when Saudi Arabia and other Arab states intervened, violence, disease and food insecurity have engulfed Yemen. The Saudi-led coalition's airstrikes have killed or injured civilians and damaged Yemen's infrastructure, including hospitals and sewage facilities. Houthi rebels and their allied forces have laid banned antipersonnel landmines, abused detainees and indiscriminately shelled civilian areas. More than half a million cases of suspected cholera and approximately two thousand associated deaths have been reported. Nearly two million children are acutely

31 Human Rights Council 36th Session, 19 September 2017 (statement of Fatsah Ouguerouz, Chair, Commission of Inquiry on Burundi), available online at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColBurundi/ReportHRC36/OralBriefing19Sept2017.EN.pdf> (visited 12 December 2017).

32 United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Decides to Dispatch an Expert Team to Investigate Human Rights Violations in Burundi*, 28 September 2017, available online at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22180&LangID=E> (visited 12 December 2017).

33 Human Rights Council Res. 36, UN Doc. A/HRC/36/L.9/Rev. 1, 29 September 2017; see also United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Extends Mandate of Commission of Inquiry on Burundi*, 29 September 2017, available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22183&LangID=E> (visited 12 December 2017).

34 T. Miles, 'Burundi Loses Bid to Stop U.N. Atrocities Investigations', *Reuters*, 29 September 2017, available online at <http://www.reuters.com/article/us-burundi-un/burundi-loses-bid-to-stop-u-n-atrocities-investigation-idUSKCN1C4180?il>; L.J. Manishatse, 'Human Rights Council Adopts Two Resolutions on Burundi', *IWACU*, 30 September 2017, available online at <http://www.iwacu-burundi.org/englishnews/human-rights-council-adopts-two-resolutions-on-burundi/> (websites visited 12 December 2017).

35 J. Moore, 'Trying to Sidestep a Potential Scandal, Burundi Quits International Criminal Court', *New York Times*, 28 October 2017, at A4.

36 ICC-Burundi, *supra* note 27; International Criminal Court, *ICC Judges Authorise Opening of an Investigation Regarding Burundi Situation*, 9 November 2017, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1342> (visited 12 December 2017).



malnourished, and more than ten million people require immediate assistance. The heads of three UN agencies (the UN Children's Fund, the World Food Program and the World Health Organization) have jointly referred to Yemen as 'the world's largest humanitarian crisis', as has Human Rights Watch.<sup>37</sup>

On 29 September 2017 (the same day the UNHRC extended the mandate of the Burundi COI), the UNHRC adopted a resolution requesting the UN High Commissioner for Human Rights to establish, by the end of the year, 'a Group of International and Regional Experts' to monitor and report on human rights violations in Yemen since September 2014. The UNHRC authorized the creation of this expert group after declining to adopt a draft resolution that would have established an international COI for Yemen. The UNHRC directed the expert group to present a written report to the High Commissioner by the UNHRC's thirty-ninth session (in September 2018).<sup>38</sup>

### 3. Sponsors

The specific UN component sponsoring each of the five investigations introduced in Part 2 varied in ways that are relevant to their operations and outcomes. The UNSC established the investigative team for Iraq; the UNGA formed the IIIM for Syria; and the UNHRC created the Syria and Burundi COIs, dispatched the FFM for Myanmar, and authorized the expert groups for Burundi and Yemen.

That the investigation of international law violations has proceeded in the UNSC only for Iraq is unsurprising. A UNSC-backed option was not possible in the other four states because they did not provide their consent. The governments or other forces in control of Syria, Burundi, Myanmar and Yemen have

37 For background on the humanitarian crisis in Yemen, see e.g. S. Almosawa et al., "It's a Slow Death": The World's Worst Humanitarian Crisis', *New York Times*, 23 August 2017, available online at <https://www.nytimes.com/interactive/2017/08/23/world/middleeast/yemen-cholera-humanitarian-crisis.html>; J. Fisher, *UN's Top Human Rights Body Should Establish Yemen Inquiry*, Human Rights Watch, 25 September 2017, available online at <https://www.hrw.org/news/2017/09/25/uns-top-human-rights-body-should-establish-yemen-inquiry>; Human Rights Watch, *Yemen: Events of 2016*, available online at <https://www.hrw.org/world-report/2017/country-chapters/yemen>; *Statement by UNICEF Executive Director, Anthony Lake, WFP Executive Director, David Beasley and WHO Director-General, Dr. Tedros Adhanom Ghebreyesus, Following Their Joint Visit to Yemen*, 26 July 2017, available online at <https://reliefweb.int/report/yemen/statement-unicef-executive-director-anthony-lake-wfp-executive-director-david-beasley> (websites visited 12 December 2017).

38 United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Concludes Thirty-Sixth Session After Adopting 33 Resolutions and a Presidential Statement*, 29 September 2017, available online at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22189&LangID=E>; see also N. Cumming-Bruce, 'U.N. Arm Agrees to Send Team to Examine Yemen', *New York Times*, 30 September 2017, at A9 (hereafter Cumming-Bruce, 'UN Examine Yemen'); Amnesty International, *UN: Breakthrough Resolution Establishes Expert Group to Investigate Violations in Yemen*, 29 September 2017, available online at <https://www.amnesty.org/en/latest/news/2017/09/un-breakthrough-resolution-establishes-expert-group-to-investigate-violations-in-yemen/> (websites visited 12 December 2017).

all been accused of perpetrating atrocity crimes,<sup>39</sup> and thus predictably have objected to or would oppose any UN effort to hold themselves or their supporters accountable. Concerned about violations of sovereignty, Russia and China have thus blocked meaningful accountability efforts through the UNSC. Russia's obstructionism in the case of Syria<sup>40</sup> (to the tune of nine vetoes of relevant UNSC resolutions to date<sup>41</sup>) is likely further driven by the fact that Vladimir Putin's administration is Syria's greatest ally and accused co-conspirator.<sup>42</sup> Neither Russia, China, nor any other state can veto initiatives of the UNGA or the UNHRC, enabling those institutions to be viable sponsors of investigations in Syria, Myanmar, Burundi, and Yemen.

Iraq, on the other hand, fully consented to a UN investigation, albeit on its own terms. In mid-August 2017, Iraqi Foreign Minister al-Jaafari sent a letter to the UNSC president requesting 'the international community to provide assistance, so that we can make use of international expertise in our effort to prosecute the terrorist entity ISIL' and noting that his government would work with the UK to present a relevant draft UNSC resolution.<sup>43</sup> At the same time, al-Jaafari stressed that 'Iraq must maintain its national sovereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution.'<sup>44</sup> UNSC resolution 2379 faithfully fulfils al-Jaafari's requirement of protecting Iraq's sovereignty. The preamble reaffirms the UNSC's 'respect for the sovereignty, territorial integrity and unity of Iraq,'<sup>45</sup> and an operative paragraph '[u]nderscores that the Investigative Team shall operate with full respect for the sovereignty of Iraq and its jurisdiction over crimes committed in its territory.'<sup>46</sup> To reinforce this principle when explaining their support for the resolution, the ambassadors to the UN of China,

39 In the case of Yemen, I am referring to the Houthi rebels that captured much of the state, including the capital, Sanaa. See e.g. Human Rights Watch, *Yemen: No Accountability for War Crimes*, 12 January 2017, available online at <https://www.hrw.org/news/2017/01/12/yemen-no-accountability-war-crimes> (visited 12 December 2017).

40 S. Sengupta, 'China and Russia Block Referral of Syria to Court', *New York Times*, 23 May 2014, at A3; UN SCOR, 68th Sess., 7180th mtg., UN Doc. S/PV.7180, 22 May 2014.

41 R. Gladstone, 'Russia Blocks Move at U.N. to Extend Syria Inquiry', *New York Times*, 25 October 2017, at A6; L. Loveluck, 'Russia Vetoes U.N. Efforts to Extend Syria Probe', *Washington Post*, 25 October 2017, at A12.

42 Human Rights Watch, *Russia / Syria: War Crimes in Month of Bombing Aleppo*, 1 December 2016, available online at <https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo> (visited 12 December 2017).

43 UN Security Council, *Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/2017/710, 16 August 2017 ('UNSC Letter 14/8/17'); see also Riham Alkousaa, 'Iraq Seeks International Help to Investigate Islamic State Crimes', *Reuters*, 16 August 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/iraq-seeks-international-help-to-investigate-islamic-state-crimes-idUSKCN1AW2E7>.

44 UNSC Letter 14/8/2017, *supra* note 43.

45 SC Res. 2379, at preamble.

46 *Ibid.*, § 5.

Bolivia and Ethiopia all stressed the importance of maintaining Iraq's sovereignty.<sup>47</sup>

Given the UNSC's primary responsibility for 'the maintenance of international peace and security',<sup>48</sup> and thus the UNSC's additional enforcement powers relative to other UN bodies, the investigative team for Iraq is inherently stronger than its counterparts created by the UNGA and the UNHRC. Perhaps if the UNSC, with its enforcement capability, had sponsored the investigative bodies for Burundi and Myanmar instead of the UNHRC, then those two states would not have blocked UN investigators from entering.

A development in August 2017 further underscores the role the UNSC plays in accountability for atrocity crimes, even when it is not the sponsor of an investigative body. On 6 August, Carla del Ponte, former chief prosecutor of the UN International Criminal Tribunals for Rwanda and for the former Yugoslavia as well as one of the three members of the Syria COI, resigned from the latter in frustration over the body's lack of progress. She stated: 'I give up. The states in the Security Council don't want justice .... I can't any longer be part of this commission which simply doesn't do anything.'<sup>49</sup> She added: 'It was all about the inaction of the Security Council because if you look at all the reports we have published, we have obtained nothing in terms of injustice.'<sup>50</sup> Even though it was the UNHRC that created the Syria COI, del Ponte's condemnation of the UNSC is telling. Her words suggest that the UNSC is ultimately responsible for accountability in Syria because it is considered the dominant actor in this space. Investigative bodies established outside the UNSC are relatively weak.

Just as one can compare the relative strength of UN investigative bodies based on whether they are sponsored by the UNSC, so too can one assess the relative strength of UN investigative bodies outside the UNSC. Multiple types of investigative bodies exist even just within the UNHRC, including COIs, FFMs, and expert groups. COIs are the UNHRC's strongest investigative tool.<sup>51</sup> That the governments of Saudi Arabia and Burundi sought to avoid the creation of COIs for Yemen and Burundi, respectively, and instead supported

47 Security Council Press Release, *Security Council Requests Creation of Independent Team to Help in Holding ISIL (Da'esh) Accountable for its Actions in Iraq*, UN Press Release SC/12998, 21 September 2017 (summarizing diplomats' statements).

48 Art. 24(1) UN Charter.

49 M. Kennedy, 'I Give Up: Top War Crimes Expert Resigns from U.N.'s Syria Inquiry', *National Public Radio*, available online at <http://www.npr.org/sections/thetwo-way/2017/08/07/542034643/-i-give-up-frustrated-war-crimes-expert-resigns-from-u-n-syria-inquiry> (visited 12 December 2017) (quoting Del Ponte).

50 P. Wintour, 'UN Syria Investigator Quits over Concern about Russian Obstruction', *Guardian*, 7 August 2017, available online at <https://www.theguardian.com/world/2017/aug/07/we-are-powerless-un-syria-investigator-carla-del-ponte-quits-over-lack-of-political-backing> (visited 12 December 2017) (quoting Del Ponte).

51 F. Solomon, 'The U.N. has Agreed to Investigate Myanmar's Alleged Abuse of Rohingya,' *Time*, 23 March 2017, available online at <http://time.com/4710430/myanmar-rohingya-human-rights-council-probe/> (visited 12 December 2017) (identifying COIs as the UNHRC's 'most powerful investigative tool').

expert groups as a weaker, compromise option,<sup>52</sup> underscores the relative strength of these two mechanisms within the UNHRC. And that Saudi Arabia—a regional power in the Middle East that reportedly threatened to retaliate against states that supported a COI for Yemen<sup>53</sup>—achieved its preferred outcome, while Burundi did not, suggests that a relatively strong, aggressive state may be able to insist on a particular type of investigative body when it cannot prevent an investigation altogether.

#### 4. Scopes

The investigative bodies for Syria, Myanmar, Burundi and Yemen do not focus on any specific suspected group of atrocity crime perpetrators. In contrast, by the terms of UNSC resolution 2379, the investigative team for Iraq must concentrate exclusively on ISIS. Yet other groups within Iraq are also suspected of committing serious human rights violations. US Senator Patrick Leahy<sup>54</sup> and HRW<sup>55</sup> have accused Iraqi and/or Kurdistan Regional Government forces of committing abuses, but such groups do not fall under the UN investigative team's mandate.

Some observers already are criticizing the scope of the investigative team for Iraq. The same day the UNSC adopted the resolution, the Global Centre for the Responsibility to Protect lamented 'the limited focus' of the resolution.<sup>56</sup> The NGO added: 'No voices should be marginalized or silenced in the pursuit of justice in Iraq, including those of Sunni families who have faced sectarian reprisals in territory reclaimed from ISIL.'<sup>57</sup> (Iraq's Sunni community fears such violence from Shiite militias.<sup>58</sup>) The President of the Global Justice Center likewise declared: 'Only prosecuting Daesh fighters reeks of victor's justice.'<sup>59</sup>

52 Cumming-Bruce, 'UN Examine Yemen,' *supra* note 38; Miles, *supra* note 34.

53 Cumming-Bruce, 'UN Examine Yemen,' *supra* note 38.

54 James Gordon Meek et al., 'US Ignores Evidence of Atrocities by Blacklisted Iraqi Military Unit,' *ABC News*, 31 May 2017, available online at <http://abcnews.go.com/International/us-ignores-evidence-atrocities-blacklisted-iraqi-military-unit/story?id=47745913> (quoting Leahy).

55 See, e.g., Human Rights Watch, *Iraq: Execution Site Near Mosul's Old City*, 19 July 2017, available online at <https://www.hrw.org/news/2017/07/19/iraq-execution-site-near-mosuls-old-city>; Human Rights Watch, *Iraq: Investigate Possible Mosul Abuse*, 13 July 2017, available online at <https://www.hrw.org/news/2017/07/13/iraq-investigate-possible-mosul-abuse>; Human Rights Watch, *Iraq: US-Trained Forces Linked to Mosul War Crimes*, 27 July 2017, available online at <https://www.hrw.org/news/2017/07/27/iraq-us-trained-forces-linked-mosul-war-crimes>.

56 Global Centre for the Responsibility to Protect, *Statement on Today's UN Security Council Resolution on Da'esh Accountability*, 21 September 2017, available online at <http://gcr2p.cmail20.com/t/ViewEmail/j/27D4C5151C4F82092540EF23F30FEDED/9A528AF75E9ECF6C14399806BE9B4083>.

57 *Ibid.*

58 Tim Arango, 'Iraq Celebrates a Win in Mosul as Rifts Widen,' *New York Times*, 11 July 2017, at A1.

59 Global Justice Center Press Release, 'UN Security Council Adopts Resolution – One Step Towards Justice for the Yazidi Genocide,' 21 September 2017, available online at <http://globaljusticecenter.net/press-center/press-releases/832-un-security-council-adopts-resolution-one-step-towards-justice-for-the-yazidi-genocide>.

Similarly, HRW denounced the resolution as ‘flawed,’ ‘shortsighted’ and ‘selective,’ claiming that the UNSC failed to include ‘abuses by Iraqi and international forces’ within the investigative team’s mandate.<sup>60</sup> HRW thus recommended broadening ‘the investigations to includes abuses by all sides in the conflict.’<sup>61</sup>

It is no coincidence that the investigative team for Iraq is constrained in its mandate and that this team is the only UN investigative body discussed in this article to which the relevant domestic government or controlling power consented. The Iraqi government presumably would not have agreed if UNSC resolution 2379 had included an investigation of offenses allegedly perpetrated by the Iraqi government itself. The investigative body for Iraq is thus the only one authorized by the UNSC *precisely* because it is the only one with a mandate that specifies its (non-state actor) target a priori. Even though, among all of the combatants, ISIS has been accused of committing the most heinous offenses in Iraq, that the corresponding UN investigation is not agnostic as to suspects will cause it to overlook other serious human rights abuses. Consequently, non-ISIS human rights violators in Iraq may be left undeterred and unpunished. Victims of such offenses will predictably and understandably feel injustice, fomenting grievances that could lead to cycles of enmity and violence.<sup>62</sup>

## 5. Questions about the Investigations

This part poses questions about the investigations, including their operation, number, types, precedential value and product.

### A. Operation of Investigations

Each investigative body faces similar logistical questions. What will be each probe’s overall cost? Which states will provide financial and technical support? Will their staff be as frustrated as del Ponte was about the Syria COI? Which courts (domestic, foreign, international and/or hybrid) will use the evidence collected, preserved and stored by the investigative teams? Will prosecutions meet internationally recognized due process standards? More generally, which transitional justice measures<sup>63</sup> — besides the investigation and prosecution of

60 Human Rights Watch, *Iraq: Missed Opportunity for Comprehensive Justice*, 21 September 2017, available online at <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice>.

61 *Ibid.*

62 See, e.g., Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton University Press, 2002).

63 For an overview of transitional justice measures, see Zachary D. Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics, and Pragmatics* (Oxford University Press, 2016), at 21–40.

suspected international law violations — will be implemented in, or at least for, each state?

Some of the investigative bodies face specific operational questions. Regarding Iraq, will the investigative team's mandate eventually expand to include international law violations perpetrated in the state by groups other than ISIS?

### ***B. Number of Investigations***

Not only do the UN investigations described in Part 2 occur concurrently across five states (Iraq, Syria, Myanmar, Burundi and Yemen), but some of these investigations also operate at the same time within states (e.g. the COI and IIM for Syria; the COI and expert group for Burundi) or simultaneously focus on the same group of atrocity perpetrators (e.g. ISIS). What, if any, significance is there in the UN's contemporaneous attention to so many states consumed by international law violations? At the very least, the trend indicates the need for international action in the face of widespread human rights abuses. But do the international community's responses reflect sincere attempts to address abuses, or are these investigations merely relatively uncontroversial window-dressing? Does the UN's establishment of multiple investigative bodies for the same state or group of atrocity perpetrators suggest an even more genuine interest in addressing those situations, concern about the shortcomings of the earlier mechanisms in each case, or a reflection of the particular complexity of a situation (e.g. Syria is the locus of both a civil war and ISIS-perpetrated atrocity crimes)? Where multiple UN investigative bodies are focusing on the same state or group of atrocity perpetrators, will they cooperate? What will happen if these multiple investigative bodies for the same situation collect conflicting evidence? And will the mere creation of these investigative bodies deter future international law violations within their corresponding states and beyond?

### ***C. Types of Investigations***

The investigations initiated for the five states discussed in this article represent four types of inquiries. One category is government-initiated probes, as in Myanmar's Investigation Commission for Maungdaw in Rakhine State. A second category is inquiries initiated by the UNGA, as for Syria. A third category is investigations initiated by the UNHRC. This category features multiple sub-categories: FFMs (as in Myanmar), expert groups (as in Burundi and Yemen) and COIs (as in Burundi and Syria). A final category is examinations initiated by the UNSC, as for Iraq. Given the UNSC's enforcement power, do the three categories of inquiries not sponsored by that body still hold value for the genuine pursuit of justice or are they feeble fallbacks in the absence of international consensus through the UNSC? Is the proliferation of investigative bodies a sign of strength and creativity or weakness and superficiality in the

pursuit of accountability? Alternatively, is backing by the UNSC overvalued, given that body's failure to add teeth to other accountability measures it has supported, such as the referral of Darfur to the ICC?<sup>64</sup>

#### ***D. Precedential Value of Investigations***

These investigations raise questions about the precedents set by their specific mandates. UNSC resolution 2379's preamble emphasizes that ISIS 'constitutes a global threat to international peace and security' and is a 'terrorist group'.<sup>65</sup> Will the international community also pursue atrocity prevention and accountability through the UNSC even where suspected perpetrators do not constitute a global threat or qualify as terrorist organizations? If, for example, Myanmar is indeed engulfed in genocide, as so many believe, why should the UNSC not be as concerned and engaged there as it is in Iraq, where so many have also identified genocide? Given how Myanmar is hampering the UNHRC-sponsored investigation, greater involvement by the UNSC in that situation could be helpful.

These investigations also raise questions about the precedents set by their general success. If some of these bodies fail to fulfil their mandates, will the UN seek to strengthen them or will the UN abandon them as anaemic accountability mechanisms in the face of power politics?

#### ***E. Product of Investigations***

How will each UN investigation collect, preserve, and store evidence? As Andras Vamos-Goldman, Executive Director of Justice Rapid Response, has rightly asked, how will documenters ensure that such evidence is gathered in a way that will be admissible in whichever court(s) ultimately use the evidence? This question is fraught because documenters do not know the rules of procedure and evidence that will govern the information they collect and because there is no commonly accepted set of such rules.<sup>66</sup> Will the proliferation of these investigative bodies lead to the creation of such common standards?

UNSC resolution 2379 states that the investigative team for Iraq should collect, preserve, and store evidence 'to the highest possible standards'<sup>67</sup> and that

64 On 31 March 2005, the UNSC referred the situation in Darfur, Sudan, to the ICC. Security Council Press Release, *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court* UN Press Release SC/8351, 31 March 2005. Subsequently, the ICC Prosecutor and others have criticized the ICC for not helping to bring to justice individuals, including Sudanese President Omar al-Bashir, indicted by the ICC for atrocity crimes in Darfur. See e.g. UN Security Council, 7710th mtg., UN Doc. SC/12393, 9 June 2016, available online at <https://www.un.org/press/en/2016/sc12393.doc.htm> (visited 12 December 2017).

65 SC Res. 2379, 21 September 2017, at preamble.

66 A. Vamos-Goldman, 'The Importance of Professional Expertise in Gathering Evidence of Mass Atrocities', *Just Security*, 27 October 2017, available online at <https://www.justsecurity.org/46355/rules-govern-evidence-gathering-conflict-zones/> (visited 12 December 2017).

67 SC Res. 2379, at § 2.

the evidence should be used ‘in fair and independent criminal proceedings, consistent with applicable international law’.<sup>68</sup> While the resolution emphasizes the importance of internationally recognized due process standards, the specific prosecutorial fora are critical unknowns. The resolution states, in paragraph five (which emphasizes Iraq’s ‘jurisdiction over crimes committed in its territory’), that the evidence should be used in criminal proceedings ‘conducted by competent national-level courts, with the relevant Iraqi authorities as the primary intended recipient’.<sup>69</sup> Will those anticipated prosecutions within Iraq meet internationally recognized due process standards? The resolution also allows for evidence to be used as ‘determined in agreement with the Government of Iraq on a case by case basis’.<sup>70</sup> Some have interpreted that language to include the possibility of use by international courts.<sup>71</sup> A hybrid tribunal (as has been employed for Bosnia and Herzegovina, Cambodia, Kosovo, Lebanon, Sierra Leone and Timor Leste<sup>72</sup>) — combining lawyers, judges, and other professionals from both Iraq and the international community — might be another option. Indeed, there is precedent for such a mixed court in Iraq. The Iraqi High Tribunal, which some consider a hybrid body,<sup>73</sup> tried Saddam Hussein and certain members of his regime.<sup>74</sup>

68 *Ibid.*, at § 5.

69 *Ibid.*

70 *Ibid.*

71 M. Nichols, ‘U.N. Team to Collect Evidence of Islamic State Crimes in Iraq’, *Reuters*, 21 September 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/u-n-team-to-collect-evidence-of-islamic-state-crimes-in-iraq-idUSKCN1BW26J> (visited 12 December 2017).

72 For an overview of hybrid war crimes tribunals, see e.g. K. Ambros and M. Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia* (Max Planck Institute for Foreign and International Criminal Law, 2003); C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004); Kaufman, *supra* note 63, at 21-40; S. Williams, *Internationalized Criminal Courts and Tribunals: Selected Jurisdictional Issues* (Hart, 2012); L. Dickinson, ‘The Promise of Hybrid Courts’, 97 *American Journal of International Law* (2003) 295; L. Dickinson, ‘Transitional Justice in Afghanistan: The Promise of Mixed Tribunals’, 31 *Denver Journal of International Law and Policy* (2002) 23; E.R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, 23 *Arizona Journal of International and Comparative Law* (2006) 347; S. Katzenstein, ‘Hybrid Tribunals: The Search for Justice in East Timor’, 16 *Harvard Human Rights Journal* (2003) 245; S.M.H. Nouwen, ‘Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts’, 2 *Utrecht Law Review* (2006) 190; W.A. Schabas, ‘The Special Tribunal for Lebanon: Is a “Tribunal of an International Character” Equivalent to an “International Criminal Court”?’ 21 *Leiden Journal of International Law* (2003) 513; S. Williams, ‘Hybrid International Criminal Tribunals’, *Oxford Bibliographies*, 28 April 2014, available online at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>; United Nations, *International and Hybrid Criminal Courts and Tribunals*, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> (websites visited 12 December 2017).

73 See e.g. Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases* (2008), available online at <https://www.chathamhouse.org/sites/files/chathamhouse/field/field.document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf> (visited 12 December 2017).

74 For an overview of the Iraqi High Tribunal and trial of Saddam Hussein, see e.g. M.A. Newton and M.P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (St Martin’s



Where, unlike in Iraq, the government is uncooperative with the relevant UN investigation, the forum and likelihood of justice are even less clear. In the other four states, evidence collected, preserved, and stored by the relevant UN investigative bodies may ultimately be used by one or a combination of domestic, foreign, international or hybrid courts. Each context will dictate the ultimate transitional justice mechanism. For example, given that Burundi has withdrawn from the Rome Statute, will the ICC use evidence collected by the Burundi COI and expert group? As another example, given that Syria has not ratified the Rome Statute, and Russia and China have blocked a referral of the situation from the UNSC to the ICC, the ICC does not appear to be a viable option for promoting justice in that state. At least for now, the only individuals likely to face prosecution for perpetrating atrocity crimes in Syria are lower-level offenders who have fled abroad.<sup>75</sup> Some European states, such as Sweden and Germany, already are arresting, prosecuting and convicting such perpetrators.<sup>76</sup>

## 6. Implications

This part considers implications of the investigations, including for the ICC, genocide accountability, state cooperation and the Trump Administration's commitment to human rights.

### A. Future of the International Criminal Court

The proliferation of investigative bodies suggests that, while the international community seeks accountability for atrocities, it does not necessarily view the ICC as the default or desired avenue. Components of the UN apparently believed that the violations of international law in Iraq, Syria, Myanmar, Burundi and Yemen were serious enough to warrant sponsoring investigations outside the ICC. Yet, in no case, at least at the time of this writing, has the UNSC referred the situation to the ICC. (That said, UN investigative bodies for both Syria and Burundi have recommended that the ICC take up each situation.) Will the outcome of investigations regarding any of these five states result in a UNSC referral to the ICC? If not, which alternative accountability mechanisms will the UNSC support, if any, and are the parameters of each

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Press, 2008); M.P. Scharf and G.S. McNeal, *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Carolina Academic Press, 2006).

75 B. Taub, 'Does Anyone in Syria Fear International Law?' *New Yorker*, 31 August 2016, available online at <https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law> (visited 12 December 2017).

76 Human Rights Watch, *Syria: First Atrocities Trials Held in Europe*, 3 October 2017, available online at <https://www.hrw.org/news/2017/10/03/syria-first-atrocities-trials-held-europe> (visited 12 December 2017).

UN investigation intentionally designed to sidestep the ICC?<sup>77</sup> If the ICC does not prosecute suspected atrocity perpetrators in these five states, which are sites of the worst humanitarian crises in the world today, will the Court's already damaged credibility erode even more and will its role in international affairs be further questioned?

### **B. Accountability for Genocide**

The Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) obligates states parties, including the United States,<sup>78</sup> 'to prevent and to punish' genocide.<sup>79</sup> The immediate past and current US Secretaries of State as well as many other officials and experts have characterized crimes against Yezidis, Christians and Shia Muslims as 'genocide'. Similarly, the US Senate Foreign Relations Committee's Ranking Member and other experts have characterized crimes against the Rohingya as 'genocide'. Will states parties to the Genocide Convention that agree with these determinations seek to fulfil their obligations under the treaty 'to prevent and to punish' such genocides?<sup>80</sup> And will such states use or collaborate with the UN investigations in Iraq, Syria and Myanmar to do so?

### **C. Cooperation of States**

Will Myanmar and Burundi brazenly continue to refuse cooperation with the UNHRC investigations in those states? If so, will the UNSC, with its relatively stronger mandate, authorize and enforce an investigation, as it has done in Iraq? How will the UN's credibility be impacted if Myanmar and Burundi thwart such investigations?

In the particular case of Burundi, the unprecedented act of a state withdrawing from the Rome Statute after the ICC opened an investigation

77 K. Curtis, 'The World is Sidestepping the International Criminal Court to "Investigate" War Crimes in Yemen and Iraq?' UN Dispatch, 11 October 2017, available online at <https://www.undispatch.com/world-sidestepping-international-criminal-court-investigate-war-crimes-yemen-iraq/> (visited 12 December 2017) (arguing that the international community is sidestepping the ICC in at least the cases of Yemen and Iraq).

78 S.V. Roberts, 'Reagan Signs Bill Ratifying U.N. Genocide Pact', *New York Times*, 5 November 1988, at § 1, 28.

79 Art. I Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 102 Stat. 3045, 78 UNTS 277.

80 In the case of China, some doubt, for economic interests, that it is likely to support a genocide determination in the case of the Rohingya. See, e.g., Azeem Ibrahim, Opinion, 'There's Only One Conclusion on the Rohingya in Myanmar: It's Genocide', *CNN*, 23 October 2017, available online at <http://www.cnn.com/2017/10/23/opinions/myanmar-rohingya-genocide/index.html> (visited 19 December 2017) (noting that China, a party to the Genocide Convention that is constructing a branch of its 'New Silk Road' through Rakhine State to access the port of Sittwe, is likely to veto any UNSC characterization of the situation in Myanmar as 'genocide').

complicates an already challenging situation.<sup>81</sup> Will Burundi cooperate with that investigation, which the Rome Statute requires it to do since the investigation commenced before the effective date of the state's withdrawal?<sup>82</sup> If not, what, if any, consequences will (or even could) Burundi suffer for violating a treaty from which it has withdrawn?

Will Iraq continue to cooperate with the UNSC investigation within its borders? Would Iraq cease doing so if the investigation unearthed evidence of the Iraq government's own violations of international law? If so, what steps would the UNSC take to enforce resolution 2379?

Regarding Syria, if Assad leaves or is removed from power and his successor consents, would the UNSC set up an investigative mechanism for the state? Or would the Putin Administration's alliance with, and suspected crimes alongside, the Assad regime lead Russia even then to continue vetoing any meaningful UNSC accountability actions?

#### ***D. Commitment of Trump Administration to Human Rights***

The Trump Administration is often criticized for abandoning the US government's traditional commitment to human rights.<sup>83</sup> But does the Administration's active support of at least some of the UN investigations mentioned in this article (e.g. Iraq) indicate that it may care about, and work to protect, human rights more than its opponents suggest? Or can the White House's support in such cases be explained better as a means to promote strategic interests rather than values? Perhaps the Trump Administration is merely following what I have argued elsewhere is the US government's traditional approach to transitional justice: balancing principles, politics and pragmatics.<sup>84</sup>

81 See e.g. Amnesty International, *Burundi: Cynical ICC Withdrawal Will Not Derail Wheels of Justice*, 27 October 2017, available online at <https://hrij.amnesty.nl/burundi-icc-withdrawal/>; K.J. Heller, 'A Dissenting Opinion on the ICC and Burundi', *Opinio Juris*, 29 October 2017, available online at <http://opiniojuris.org/2017/10/29/does-the-icc-still-have-jurisdiction-over-crimes-in-burundi/>; A. Whiting, 'If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?', *Just Security*, 12 October 2016, available online at <https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/> (websites visited 12 December 2017).

82 Art. 127 ICCSt.; see also A. Whiting, 'The ICC's New Burundi Investigation: Where is the Court Headed?' *Just Security*, 10 November 2017, available online at <https://www.justsecurity.org/46936/iccs-burundi-investigation-court-headed/> (visited 12 December 2017).

83 See e.g. S. Nossel, 'It's OK that Trump Doesn't Care about Human Rights', *Foreign Policy*, 19 June 2017, available online at <http://foreignpolicy.com/2017/06/19/its-ok-that-trump-doesnt-care-about-human-rights/>; S.B. Snyder, Opinion, 'Is the Trump Administration Abandoning Human Rights?' *Washington Post*, 2 July 2017, available online at <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/is-the-trump-administration-abandoning-human-rights/> (websites visited 12 December 2017).

84 Kaufman, *supra* note 63.

## **7. Conclusion**

While seeking accountability for international law violations is certainly laudatory, the recent, ongoing UN investigations in Iraq, Syria, Myanmar, Burundi and Yemen raise significant questions about achieving that goal amidst rampant human rights abuses there and beyond. International lawyers, atrocity crime survivors and other observers thus await answers before assessing whether these investigations will truly promote justice.