


WHO'S RESPONSIBLE?



ATTRIBUTING INDIVIDUAL RESPONSIBILITY
FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS
AND HUMANITARIAN LAW
IN UNITED NATIONS COMMISSIONS OF INQUIRY,
FACT-FINDING MISSIONS AND OTHER INVESTIGATIONS



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER



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New York and Geneva, 2018

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Foreword

It is a pleasure to present *Who's Responsible? Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in United Nations Commissions of Inquiry, Fact-Finding Missions and other Investigations*, a publication whose goal is to assist efforts to ensure accountability – at the individual level – for violations of international human rights and/or humanitarian law and/or for international crimes.

Recent years have seen a rapid expansion in the number of human rights investigations called upon to identify individuals allegedly responsible for violations and crimes. Now more than ever investigations are collecting and processing information pertaining to such individuals, from rank-and-file members of security forces, and mid-level commanders to senior leaders at the top of the hierarchy – in both State and non-State entities. In fact, it is worth noting that United Nations member States' requests for such identification go back to the apartheid era, when the General Assembly asked the Commission on Human Rights to compile a list of individuals, organizations, institutions and representatives of States that were believed to be responsible for the crime of apartheid. In 1984 the Commission published a list containing over 300 names.

While human rights investigative practice and methodology have evolved significantly in the intervening years, individual accountability has always been a key element. All United Nations human rights investigations retain an implicit, if not always explicit, mandate to identify those allegedly responsible for violations so as to further accountability. Doing so is an essential part of the United Nations' approach to justice, accountability, prevention, and sustainable peace.

To fulfil this task, human rights investigations have been adding new elements to existing methodology. They have taken advantage of new technology, added specialized expertise, and refocused approaches to information collection and management. Yet securing information on individuals is only the first step: making use of it in human rights-compliant and accountability-focused ways presents additional challenges. Investigations must respect various human rights norms, including the presumption of innocence and the right to a fair trial, as well as the victim's right to truth and to a remedy. This guidance lends its support to future investigations by systematizing our knowledge on the identification of alleged perpetrators and by bringing together the standards bearing on their individual identification. It seeks to set out, in clear, accessible terms, the best practices for such investigations.

The collective experience distilled here is intended primarily for investigations undertaking – or considering whether to undertake – such identification and seeking to understand the legal, policy and practical considerations involved. The content has benefited from experiences collected from members and staff of human rights investigations, from lessons-learned exercises and from canvassing the views of a range of experts who approach the identification of alleged perpetrators from their unique perspectives. I am confident that this text will be of significant use to future human rights investigations and mandating bodies, and also to the many other individuals and organizations involved in furthering the accountability imperative.



Zeid Ra'ad Al Hussein
United Nations High Commissioner for Human Rights



Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights (2015-2018), briefs the Security Council on the human rights situation in the Democratic People's Republic of Korea.

UN Photo / Amanda Voisard



INTRODUCTION AND BACKGROUND

A. Objectives and scope

United Nations Commissions of Inquiry (Col), Fact-Finding Missions (FFMs) and similar complex human rights investigations¹ are regularly, and with increasing frequency, called upon to “identify those responsible” for violations and crimes falling within their mandate. Since 2011 the mandates of half of all such investigations have included some form of identification: nine included direct requests, while a further eight mandates sought “to clarify responsibility” or “to ensure accountability”.² More recently, the Independent, Impartial International Mechanism on Syria³ was specifically mandated to build dossiers on individuals believed to be responsible for international crimes. In light of the ongoing battle against impunity, the trend appears set to continue.

Yet identifying responsible parties poses complex legal and methodological challenges. Should human rights investigative bodies *publicly* identify those responsible, i.e., name them individually in the report? What of the right to a presumption of innocence? Or is it sufficient to identify a party, group or organizational unit as responsible? Should the investigation identify only those “most responsible”, or all alleged perpetrators? If not naming publicly, what purpose does the identification fulfil? May a Col share its information on individuals it believes to be responsible? If so, with whom, when and under what circumstances?

Many of these questions must be answered early in the life of an investigation, as they impact on methodology and resource allocation. Identifying responsible individuals requires the investigative body to be properly staffed, to have sufficient time, and to make a number of important policy and methodological choices. Despite variations in mandate language, applicable legal regimes, political context, membership, timing and budgets, the practice of Col, FFMs and similar complex investigations is developing in this area. Methods are taking shape and approaches

¹ The words “investigation” and “investigative body” are used throughout this text to denote United Nations-mandated Col, FFMs, Panels of Experts and similar bodies that have a human rights investigative mandate emanating from a United Nations entity, including investigations under OHCHR mandates undertaken from headquarters or by its field presences.

² For example, Human Rights Council resolution 34/22 of 24 March 2017 created an independent international fact-finding mission for Myanmar “... with a view to ensuring full accountability for perpetrators ...”. The nine investigations with direct requests to identify perpetrators are: Côte d’Ivoire (2011), Libya (2011), Syria (2011-2018), Central African Republic (2014), Gaza (2014), Burundi (2015 and 2016), South Sudan (2016) and Yemen (2017).

³ Established in 2017 by General Assembly resolution 71/248.

to policy are increasingly being clarified.⁴ The United Nations Office of the High Commissioner for Human Rights (OHCHR) has a wealth of institutional experience in human rights field investigations where the identification of allegedly responsible individuals is a regular feature.



Members of the Fact-finding Mission on Myanmar interview a child in a refugee camp near Cox's Bazar, Bangladesh. UN / OHCHR Photo

⁴ For example, with regard to the public revelation of names, the general policy has evolved to the point where this is only rarely done. Compare that to practice in 1984 when the Commission on Human Rights was invited by the General Assembly to generate and publish a list of individuals believed to be responsible for the crime of apartheid. See Bertrand G. Ramcharan, *Protection Roles of United Nations Human Rights Procedures*, Leiden/Boston (2009), p. 130. The list published in 1984 contained the names of over three hundred persons deemed responsible for the crime of apartheid. *Ibid.*, note 167 (citing United Nations Doc A/CN.4/1984/8). Now, in place of public naming, practice includes handing over dossiers or “confidential lists” to the Secretary-General or the High Commissioner for safekeeping at the close of a mandate.

This guidance draws upon that practice and presents it together with a discussion on key policy questions. The text is structured around two broad areas:

1. How to collect and analyse information on responsible individuals, and the legal and investigative challenges involved;
2. How to manage the information once collected, and maximize its use, including by reporting, sharing and safeguarding it.

The guidance builds on OHCHR's existing guidance and practice for Cols, FFM's and other investigations.⁵ Many methodological issues relevant to identifying those responsible for violations are covered in other OHCHR publications and resources.⁶ These are referred to in the text and are expanded upon in areas relevant to identifying individuals.

The guidance sets out both the **minimum** steps that all investigative bodies should complete and **additional measures** that can and should be taken where feasible, and if resources permit. Each section ends with either *Recommendations* or a *Summary of key guidance* on the points raised.

As used in the text, the phrases "**those allegedly responsible**" and "**alleged perpetrators**" refer only to *individuals*, unless otherwise specified. Certainly other entities can be "responsible" for or commit violations and crimes, such as an organizational unit (e.g., a battalion or militia, or a non-State actor), a service or institution (e.g., the police), a party to an armed conflict, or a State. The focus in this guidance, however, is on the identification of *individuals* within the context of investigations by Cols, FFM's, OHCHR and others, and primarily – though not exclusively – on those individuals bearing responsibility either at the highest levels of a hierarchy or for the most serious violations and crimes.

The term "**identification**" means assessing the information available and making a determination, pursuant to the appropriate standard of proof employed in a human rights inquiry, that an *individual* is believed to be *responsible* for a particular violation, crime or abuse. "**Responsibility**" as used here recognizes many forms, on different levels, such as political, moral, disciplinary, administrative, civil, etc. It does not mean that the individual has been found "guilty" in the criminal legal sense,⁷ nor does the fact that a person is not "identified" imply they are innocent.

⁵ OHCHR *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, hereinafter referred to as *Guidance and Practice*, 2015.

⁶ See, for example, OHCHR *Manual on Human Rights Monitoring*.

⁷ A domain reserved for a full criminal trial where all the due process protections relevant in international human rights law have been afforded.

B. Target audience

Members and staff of United Nations-mandated investigations, including CoIs, FFMIs and similar, must be aware of the processes involved, the ramifications for individuals or units identified, and the options and alternatives for the use of information concerning individuals allegedly responsible for serious violations of human rights and international humanitarian law. OHCHR field presences with a monitoring mandate face similar issues, while all human rights officers (HROs) in possession of such information must be cognizant of the implications not only for the persons identified, but also for witnesses and victims and their families – who may have contributed to the investigation’s ability to make the identification and may have remained in places of risk – as well as other persons who may be impacted.⁸

Member States of United Nations bodies that confer mandates should also understand fully the positive and negative implications, potential uses and limits – also in cost/benefit terms – of identifying alleged perpetrators of violations and crimes.

Finally, non-United Nations-mandated human rights investigations face similar issues with respect to the collection, analysis and use of investigation materials concerning individuals. For example, non-governmental organizations, national human rights institutions, national commissions of inquiry and an increasing number of regional organizations, such as those under African Union auspices, are conducting investigations in which individuals may be identified.⁹

⁸ Nowhere is the “do no harm” principle more salient than when directly implicating individuals. Victims, witnesses and investigators have faced reprisals and threats of reprisals.

⁹ The procedural and substantive legal regimes of such investigations may differ significantly from those treated here, for example as regards the power to issue subpoenas, so the guidance here may be inapplicable in some areas.



WHETHER TO IDENTIFY INDIVIDUALS

A. Mandate

Accusing a person of violating human rights or of responsibility for crimes under international law, in any context, is a serious matter. Pointing a finger at someone in the context of an official United Nations investigation is even more so because the accusation bears the emblem of the United Nations.¹⁰ Individuals are entitled to a presumption of innocence as a fundamental human right. That notwithstanding, mandating bodies have repeatedly requested investigative bodies to undertake such identification as a weapon in the fight against impunity, and the mandated investigations are complying.

The Democratic People’s Republic of Korea Col, for example, was given a mandate:

To investigate the systematic, widespread and grave violations of human rights ... with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity ...

In fulfilling its mandate, the Col recorded “the names of individuals who committed, ordered, solicited or aided and abetted crimes against humanity”, though it did not publish them.¹¹ The report also listed the units and organizational structures within the government that it found responsible for the various specific violations committed.¹²

Mandates can also be explicit with respect to identifying individuals. For example, the mandate for the 2016 Burundi Col required it:

“To identify alleged perpetrators of human rights violations and abuses in Burundi with a view to ensuring full accountability.”¹³

¹⁰ Although Cols are independent, as are many similar United Nations-mandated investigations, their reports belong to the United Nations. The adoption of a rigorous methodology protects not only the individuals concerned, but also the Col and the United Nations more broadly.

¹¹ A/HRC/25/CRP1, para. 1196. The report continues, “This was also done where the Commission could ascertain the names of individuals who headed particular departments, prison camps or institutions implicated in crimes against humanity. Relevant information has been safeguarded in the Commission’s confidential database.”

¹² A/HRC/25/63, paras. 11 and 24.

¹³ A/HRC/33/L.31, para. 23 (b).

The mandates for the Central African Republic, Libya, Syria, Gaza (2014) and Darfur Cols contained similar language.¹⁴ Investigative bodies have always interpreted such language to include the identification of those allegedly responsible at the *individual* level.¹⁵ That noted, identifying individuals will always be in addition to identifying the responsible State, entity thereof, or non-State actor, as State responsibility remains at the forefront of human rights law.

Mandates of other investigations, such as those conducted by panels of experts¹⁶ and human rights field presences, have also included language giving rise to the identification of responsible individuals. For example, the mandate for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) reads:

“[E]mphasizing that all those responsible for all such violations and abuses must be swiftly apprehended, brought to justice and held accountable ...

“Support and work with the authorities of the Democratic Republic of the Congo to arrest and bring to justice those allegedly responsible for genocide, war crimes and crimes against humanity and violations of international humanitarian law and violations or abuses of human rights in the country, including leaders of armed groups, including through cooperation with States of the region and the International Criminal Court.”¹⁷

¹⁴ Central African Republic, Security Council resolution 2127 (2013): “to help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and to help ensure that those responsible are held accountable.” Libya (A/HRC/RES/S-15/1): “where possible, to identify those responsible, to make recommendations, in particular, on accountability measures.” Syria (A/HRC/RES/S-17/1): “to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.” Gaza (A/HRC/RES/S-21/1): “to identify those responsible, to make recommendations, in particular on accountability measures ...” Darfur, Security Council resolution 1564 (2004): “to identify the perpetrators of such violations with a view to ensure that those responsible are held accountable.”

¹⁵ This is true even though not all Cols have actually identified individuals despite having been tasked with doing so. See Gaza (2014) (A/HRC/29/52), para. 10 (“Such a standard [Reasonable grounds] is lower than that required in criminal trials; the commission therefore does not make any conclusions with regard to the responsibility of specific individuals for alleged violations of international law.”). OHCHR’s *Guidance and Practice* publication sets out how other Cols have responded to calls for accountability in their mandates: see p. 9.

¹⁶ For example, the panel established to sanction individuals involved in North Korea’s nuclear programme: see Security Council resolution 1874 (2009), para. 26 (in support of the Committee established under Security Council resolution 1718 (2006) or the United Nations Group of Experts, established by resolution 1533 (2004), on the Democratic Republic of the Congo.

¹⁷ Security Council resolution 2277 (2016), preamble, and paras. 11-12, 16, 20 and 35 (ii) (d).



The United Nations-run Office on Missing Persons and Forensics searches for war missing in Serbia and Montenegro at a cave near the village of Volujak. UN Photo / Afrim Hajrullahu

Despite this, undertaking the identification of responsible individuals depends only *in part* on the mandate. Even when a mandate includes phrases such as “to combat impunity” or “to ensure accountability”, or where it is altogether silent on the issue, there is nevertheless a duty to record, and to safeguard for future use, information on those believed to bear responsibility.¹⁸ This holds true also where the investigation has decided not to identify individuals either publicly or confidentially. Proper investigative methodology demands that information collected is recorded and secured. Moreover, a renewed mandate might call for such identification, and ultimately, when the day of accountability comes, such information should be retrievable.

¹⁸ Mandate interpretation notwithstanding, every Col/FFM should properly record and safeguard the information it has on individuals, particularly high-ranking ones or those who appear repeatedly as alleged perpetrators, regardless of rank. OHCHR field presences, for example, may identify individuals as far as capacity permits, not least to build a body of information that can inform the Human Rights Due Diligence Policy, screening, etc.

B. To what end?

Apart from referring to accountability, mandates rarely specify what should be done with the information about individuals collected in the course of an investigation. It is important at the outset, however, to define the purposes that that information might serve, as those purposes directly impact the decision on whether to identify responsible individuals at all (at least where the mandate is silent), at what level, and in what way. Indeed the question of what to do with the information collected lies at the very core of the exercise and should be given serious consideration. Some of the particular ways in which it might serve to foster accountability or to fight impunity are set out below.

Sharing information with any of the entities referred to below does not necessarily mean the individual will be punished, sanctioned, vetted, etc. Each of the mechanisms has its own methodology and protocols for assessing information from external sources, such as a Col, FFM or similar investigation.

1. Truth seeking

United Nations investigations can play an important role in transitional justice initiatives that focus on truth seeking and the historical preservation of facts.¹⁹ Information on individuals allegedly responsible for serious crimes, which has been gathered in an investigation, might feed into such processes, importantly reinforcing the notion of *individual*, as opposed to *group*, responsibility.²⁰

¹⁹ This guidance refers to notions of “transitional justice” as set out in “Report of the Secretary-General to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616). Transitional justice is not viewed as a complement to, or substitute for, criminal justice. It is rather an approach to accountability in difficult or constrained circumstances that encompasses a variety of measures of which criminal justice and truth telling may be core components.

²⁰ One example where Col reports – many of which included perpetrator information – were employed in a truth and reconciliation context is that of Chile after the Pinochet regime. See “Report of the Chilean National Commission on Truth and Reconciliation (‘Rettig Report’)”, February 1991, 826–827 (citing the “Report of the Ad Hoc Working Group Established under Resolution 8 (XXXI) of the Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile”, 1975-1978). Another example occurred with the Truth and Reconciliation Commission in Liberia which made use of the United Nations Panel of Experts report on the Harbel (Carter Camp) Massacre in 1993. See Liberia, “Truth and Reconciliation Commission, Final Report”, 29 June 2009, available at <http://trcofliberia.org/resources/reports/final/trc-of-liberia-final-report-volume-ii.pdf>. OHCHR has supported truth-seeking efforts in, inter alia, Colombia, East Timor, Sierra Leone, Côte d’Ivoire and Guatemala, including with respect to identifying alleged perpetrators of serious violations and crimes.



An investigator from the Commission of Inquiry on Burundi sets up a meeting with refugees in Mulongwe camp, in the DRC. UN / OHCHR Photo / Uta Simon

2. Criminal prosecution

Depending in large measure on the circumstances of the crimes and violations recorded, information collected during human rights investigations may facilitate criminal prosecutions. In Côte d'Ivoire,²¹ Kenya,²² Guinea,²³ Darfur²⁴ and Libya,²⁵ for example, Col information was used at the International Criminal Court and in

²¹ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, <https://www.icc-cpi.int/iccdocs/doc/doc1268605.pdf>. p. 16, note 44.

²² Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya: <https://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>. Multiple citations in the text refer to both the OHCHR FFM report and the so-called "Waki Report" from a Commission of Inquiry undertaken pursuant to an agreement negotiated by Kofi Annan.

²³ The Office of the Prosecutor, "Report on Preliminary Examination activities", 13 December 2011, para. 114.

²⁴ International Criminal Court (ICC), Press Release, "ICC – The Prosecutor of the ICC opens investigation in Darfur," ICC-OTP-0606-104, 6 June 2005.

²⁵ Situation in Libya, in the Case of *the Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*, Corrigendum of public redacted version of ICC-01/11-01/11-166, with Public Annex A and Explanatory Note, Observations on behalf of victims on the Government of Libya's Application pursuant to art. 19 of the Rome Statute, para. 41.

regional human rights courts²⁶ to support factual and legal positions or to trigger investigations. Human rights field presences, within the scope of their “fight against impunity” and “accountability” mandates, regularly share information with judicial authorities, in particular when supporting those investigations. National courts exercising either domestic or universal jurisdiction may be proceeding against individuals, or investigating incidents, identified from such investigation reports. The “International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic” has been set up to, inter alia, “prepare files to facilitate and expedite fair and independent criminal proceedings ... in national, regional or international courts”, doing so “in close cooperation with” the Syria Col.²⁷ Other countries are prosecuting international crimes based on information from such investigations. In response to one of the many requests for assistance it received, the Syria Col provided information that assisted a domestic court in determining at what point hostilities had crossed over into a non-international armed conflict.

Information of a confidential nature (including interview notes) created by human rights investigative bodies is not normally used in court directly. Rather, its use is most commonly to provide “lead information” to help a party undertake its own investigation. Materials may also help prove contextual points or resolve jurisdictional questions, or may be used in scoping or “mapping” activities undertaken by parties. As set out in more detail below (see “How to get the most from the information”), should any party seek to use such documents or information, human rights investigative bodies must carefully weigh protection concerns for all those involved.

3. Sanctions lists

Particularly where accountability in a judicial framework is unlikely, restrictive measures may be imposed on individuals identified during an investigation. For example, an investigative body may choose to recommend the imposition of such measures to United Nations bodies.

²⁶ For example the European Court of Human Rights in *L.M. and others v. Russia* (2015) cited three paragraphs of Col Syria’s eighth report to support its finding that a violation of the right to life and the right to be free from torture would be violated by expelling asylum applicants back to Syria. See also a similar case from the same period: *A.H. and J.K. v. Cyprus*, Applications nos. 41903/10 and 41911/10, European Court of Human Rights, 21 July 2015, para. 121.

²⁷ General Assembly resolution 71/248, (11 January 2017), para. 4. Its other main task is to collect, consolidate, preserve and analyse evidence of violations. *Ibid.*

Democratic People’s Republic of Korea Col

“The commission has authorized OHCHR, acting as the residual secretariat of the commission, to provide access to the existing materials contained in the database to competent authorities that carry out credible investigations for purposes of ensuring accountability for crimes and other violations committed, establishing the truth about violations committed or implementing United Nations-mandated targeted sanctions against particular individuals or institutions.”²⁸

Any cooperation with the Security Council Sanctions Group of Experts should be considered at the outset of an investigation. The Sanctions Group may have information of use to the investigation, and vice versa.²⁹ It is OHCHR’s position that any sanctions imposed should be accompanied by rigorous procedural safeguards to guarantee minimum standards of due process.³⁰

4. Deterrence

While opinions may vary as to degree, efforts to assign individual responsibility for serious international crimes and violations do have a deterrent effect, in particular on those not yet implicated in violations. Some refer to the power of stigma which may result from the individual having been named, or having being personally affected by travel bans, economic sanctions or even criminal prosecution, should the information be shared with the bodies responsible for such mechanisms. It is worth observing that deterrence may emerge in multiple ways, including at the

²⁸ “Report of the Commission of Inquiry on human rights in the Democratic People’s Republic of Korea” (A/HRC/25/63), para. 23. See also “Report of the Secretary-General on the protection of civilians in armed conflict” (S/2005/740), 28 November 2005, para. 32 (the Secretary-General “urge[s] the Council to consider the application of targeted sanctions in situations where access for humanitarian operations is denied as a result of specific attacks on those involved in the provision of humanitarian assistance”). See also Security Council resolution 2213 (2015), para. 11.

²⁹ For example, the Group of Experts convened for the Democratic Republic of the Congo (DRC) is mandated to **identify individuals and entities** committing acts in the DRC that constitute human rights violations or abuses or violations of international humanitarian law. See United Nations Group of Experts, established by resolution 1533 (2004), para. 10, as updated by subsequent resolutions, including S/RES/2293 (2016), paras. 7 (e) and 10. The Group of Experts’ focus on identifying individuals could provide the basis for cooperation. Also, the US government imposed sanctions on a senior police official from the DRC, justifying this by citing a report by the UNJHRO, www.treasury.gov/press-center/press-releases/Pages/j10496.aspx (accessed 23/06/2016).

³⁰ The 2015 Libya FFM wrote: “The High Commissioner also supports the listing of individuals responsible for planning, directing or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses under the sanctions regime of the Security Council, while urging that sanctions imposed be accompanied by rigorous procedural safeguards to guarantee minimum standards of due process” (A/HRC/31/47), para. 77. Other investigations, such as South Sudan (A/HRC/31/49), para. 83, and Eritrea (A/HRC/32/47), para. 132, have followed suit.

institutional level as systems are reformed to improve accountability. To the extent that information, when shared, feeds into other processes, deterrence may also be a secondary effect.



A forensic police officer examines fingerprints during an investigation. UN Photo / Martine Perret

5. Human rights due diligence policy

The United Nations provides support for many national security forces, some of which have been the subject of investigations, such as in the Central African Republic, Guinea, South Sudan, Iraq, Burundi, Libya, Sri Lanka, Mali, Côte d'Ivoire and Timor-Leste. The organization's Human Rights Due Diligence Policy on United Nations support to non-United Nations security forces precludes support for forces where there are substantial grounds for believing there is a real risk those forces may be involved in grave violations of international human rights law, international humanitarian law or international refugee law, and this risk cannot be mitigated.³¹ The policy is invoked in a scenario where those who directly perpetrate such violations, or civilian or military authorities that fail in their (command) responsibilities, are present among forces receiving or requesting United Nations support – frequently in the context of peacekeeping operations.³²

³¹ And where the relevant authorities fail to take the necessary corrective or mitigating measures. See "Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces", 2015, A/67/775 – S/2013/110, para. 1.

³² The United Nations Guidance Note on the policy specifically mentions CoIs when listing potential United Nations sources of information on violations and crimes. See Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, Guidance Note and text of the Policy (2015), p. 21.

Information gathered during investigations can be a rich source of material for screening individuals or units of security forces. It can also contribute to the development of accountability mechanisms that are established as part of mitigation measures following assessments of the risk that recipients of United Nations support may commit grave violations in the future.

6. Vetting

Information on alleged perpetrators can also contribute to institutional reform efforts in countries in transition. Vetting processes operate to exclude from public institutions persons who lack integrity – evidenced by their lack of “adherence to international standards of human rights and professional conduct ...”³³ Where due process concerns are adequately addressed, information from United Nations-mandated investigative bodies may be particularly helpful in depoliticizing vetting efforts, as the information will have been gathered according to a sound methodology and from a source outside national processes. In Timor-Leste, Col information played a role in vetting police officers during the post-conflict transition.³⁴

7. Screening of United Nations personnel

The United Nations Secretariat screens its personnel to ensure that it neither selects nor deploys for service in the Secretariat any individual who has “committed, or is alleged to have committed, criminal offences and/or violations of international human rights law and international humanitarian law”.³⁵ The policy applies to all categories of personnel under consideration for recruitment or already under contract with the United Nations,³⁶ where there are “reasonable grounds to believe that the individual has been involved, either directly by act or by omission (as a superior or commander)” in the commission of a human rights or international humanitarian law violation that precludes the individual from meeting the requisite highest standards of competence, efficiency and integrity.³⁷ At any given time, the United Nations has under its command approximately 85,000 military personnel

³³ OHCHR *Rule of Law Tools in Post-Conflict States, Vetting: An Operational Framework* (2006), p. 4. The term “vetting” is most commonly associated with formal, sometimes public, national processes by which governments investigate former or current members of security forces and other State institutions to evaluate their individual human rights records prior to their employment or re-employment as domestic civil servants, often in the context of structural reform processes.

³⁴ United Nations Integrated Mission in Timor-Leste, Human Rights and Transitional Justice Section, “Report on human rights developments in Timor-Leste, August 2006–August 2007”, pp. 15-16 and 25.

³⁵ Human Rights Screening of United Nations Personnel, United Nations Policy, 11 December 2012, para. 1.1.

³⁶ *Ibid.* para. 2.1: “[T]his policy applies to the selection, appointment, recruitment, contracting and deployment of all types of United Nations personnel in the Secretariat – staff and non-staff, uniformed and civilian – including those in peacekeeping missions, and special political missions.”

³⁷ *Ibid.*, para. 4.3.

and 15,000 police officers. Many of these personnel are from countries that have been the subject of investigations (or may be in the future). Information gathered by investigations is relevant for preventing individuals who are allegedly responsible for crimes or violations from being recruited.



The Deputy Police Commissioner of the United Nations Mission in the Republic of South Sudan (UNMISS) talks to a young girl during a patrol of the streets of Juba. UN Photo / Nektarios Markogiannis

8. Asylum applications

In addition to cooperation in criminal and human rights cases, investigative bodies may have information relevant to claims for asylum. The information can apprise a court or administrative body of the situation in a country and the prevailing human rights and international humanitarian law violations.³⁸ More directly, individuals suspected of involvement in war crimes, crimes against humanity or other “non-political” crimes are denied refugee status by the terms of the United Nations Refugee

³⁸ See *supra*, note 26 and accompanying text.

Convention.³⁹ Adjudicating bodies may consider information from an impartial fact-finder such as an FFM.⁴⁰

9. Advocacy

The advocacy efforts made by the United Nations are supplemented through the compilation of information on allegedly responsible individuals. For example, when an investigation presents its report to a mandating body that sought the identification of responsible individuals, the investigation may advocate for that body to take up the matter at the international level, including in regional fora, criminal tribunals or the Security Council, as relevant. The existence of United Nations-generated dossiers strengthens the voice of the High Commissioner for Human Rights, regional human rights bodies and civil society when advocating that Member States live up to their accountability-related responsibilities. United Nations field presences can leverage the information when engaging in advocacy with local authorities for accountability measures at the national level and for the use of the information in any of the eight other areas above.



The Commission of Inquiry on Burundi briefs journalists. UN Photo / Rick Bajornas

³⁹ Convention Relating to the Status of Refugees, 189 UNTS 137 (in force 22 April 1954), art. 1 (F). See also Impunity Principles, Principle 25 (“States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law”, citing the Refugee Convention and the Declaration on Territorial Asylum, adopted by the General Assembly, 14 December 1967, art. 1 (2)).

⁴⁰ Although not related to the perpetrators identified during the Darfur Col investigation, the UK’s Asylum and Immigration Tribunal cited the Darfur report to support the denial of an asylum claim. Immigration Appellate Authority, *BA (Military Service – No Risk) Sudan v. Secretary of State for the Home Department*, CG [2006] UKAIT 00006, 31 January 2006, para. 17.

Further considerations

In addition to the above, when deciding whether to collect perpetrator information proactively and, if collected, whether to share it and with whom, a number of additional points warrant consideration. Many are common to all human rights investigations, but are amplified when the focus is on particular individuals:

- The security conditions for the various sources, including the circumstances prevailing in the country where a source resides, considered in light of the “do no harm” principle;
- The intention of the mandating body;
- Victim expectations, often demanding the allocation of institutional and individual responsibility;
- The resources available to the investigative body, including the expertise of its staff, the time available, and its access to and cooperation of key sources;
- The ability to secure information of sufficient quality to have the requisite level of confidence in the findings;
- Whether any other entity is collecting information on responsible individuals, and the impartiality, methodology and scope of that entity;
- Whether failing to collect such information represents a missed opportunity to further individual accountability;
- The extent to which there is a coherent strategy on how the information will be used;
- Whether the eventual recipient of the information will adhere sufficiently to international human rights standards; whether the assurances with respect to confidentiality (and the investigation’s undertakings to sources) can be appropriately upheld by the recipient;⁴¹
- Whether sharing information will adversely impact the cooperation of sources such as low- and mid-level defectors with insider knowledge;
- The possibility that the public may mobilize to press for accountability once the responsible individuals are known; and

⁴¹ See “Assessing the recipient”, below.

- The impact on the recommendations with respect to individual accountability. The investigative body must understand who is involved, and at what levels of society/government, in order to make informed recommendations for solutions to crises and proposals for follow-on mechanisms.

After working through the above considerations, should an investigative body determine that it will identify individuals it believes to be responsible for violations and crimes, a number of methodological and resource allocation questions are triggered.



COLLECTING AND ANALYSING THE INFORMATION

A. The legal framework for identifying individuals

An investigation's mandate and the context in which it operates will determine which of the following primary legal regimes apply:

- international human rights law
- international humanitarian law, or the law of armed conflict
- crimes under international law
- the domestic law of the State concerned.

In their own way, the various regimes differ as to the manner in which *individuals* can be identified as responsible for violations, abuses and/or crimes.⁴²

1. Violations of international human rights law

It is fundamental to international human rights law that States, rather than individuals, bear “responsibility” for human rights violations at the international level.⁴³ As an abstract entity, however, a State does not “act” by itself, but rather through its agents, who may be individually identifiable.

To make a finding that a human rights violation has occurred, an investigative body must be satisfied, to the standard of proof adopted, that:⁴⁴

- (a) the incident or violation occurred under the substantive human rights law (e.g., prohibition of torture or discrimination);⁴⁵ and

⁴² *International Legal Protection of Human Rights in Armed Conflict* (HR/PUB/11/01) (2011). The parameters of these legal regimes are included here in summary form only, and the reader is referred to the more extensive treatment in that document, which is itself informed by jurisprudence at various international tribunals and human rights courts and mechanisms.

⁴³ *Ibid.* pp. 22-24.

⁴⁴ Standards of proof are discussed below, in part 3 B.

⁴⁵ This includes any contextual elements that must be proven, such as the applicability of the right, or, in the case of torture under the Convention Against Torture (CAT), for example, that the threshold of “severe” pain has been met.

- (b) the State itself or its agent(s) carried out the act, or omission, that comprised the violation.⁴⁶

When these conditions are met, the State will be considered responsible for the violation and the investigative body can report that legal conclusion. At this point the investigation could also identify as responsible the *individual(s)* who took part in the violation, i.e., the State's agents. To the extent that the investigative body has determined that non-State actors (NSAs) or de facto authorities have human rights obligations, these elements can be applied also to those entities and "agents" who took part in the violation.

Example of information to identify alleged perpetrators

An OHCHR field presence has collected credible information from multiple victims concerning torture in a State-run detention centre. The information includes the name, rank and physical description of one of the individuals directly torturing detainees. HROs have determined that the individual identified was a State agent (for example, the person was a member of the staff of the centre); the pain from the torture reached the "severe pain" threshold; and the pain was inflicted in an attempt to coerce confessions.⁴⁷ Given the consistency and quality of the information, the office might conclude that the human rights violation of torture has been committed.⁴⁸ That finding would implicate the State as duty bearer, but the office could also identify the individual perpetrating the torture. If generating a list or dossier of alleged perpetrators (see below, part 5), it might choose to include the individual.⁴⁹

⁴⁶ Where an entity or individual is involved, he/she/it must have been acting at the time as an agent of the State or with the consent or acquiescence of the State, such that he/she/it could attract the responsibility of the State under international law. The following can trigger State responsibility:

- an individual employed by the State, or empowered to exercise elements of State authority, or otherwise in a position to invoke State responsibility;
 - one of the State's organs (e.g., departments, ministries, units, etc.);
 - one of its armed forces (e.g., security services, air force, etc.);
 - persons or groups acting in fact on its instructions, or under its direction or control;
 - private persons or groups whose actions the State has acknowledged and adopted as its own conduct.
- See "Draft articles on Responsibility of States for Internationally Wrongful Acts", adopted by the International Law Commission at its fifty-third session in 2001, reproduced in Yearbook of the International Law Commission, 2001, vol. II, part II (United Nations publication, Sales No. E.04.V.17 (part 2)), arts. 4-11. The elements in these draft articles are generally accepted as reflecting customary international law.

⁴⁷ The substantive law could be, for example, ICCPR art. 7 and/or CAT arts. 1-2.

⁴⁸ This finding could be made upon weighing the facts against the appropriate "standard of proof". See part 3 B below.

⁴⁹ This finding could result even in the absence of a specific determination of traditional (criminal) elements of individual responsibility, such as "mode of liability" or *mens rea*. This is not a criminal attribution, it is a human rights finding.

Conduct of others

Somewhat more complicated is the question of whether *others* involved in the international human rights law violation may also be identified, for example the centre commander, his or her superiors or anyone who facilitated the torture, such as guards at the facility.⁵⁰ Where the human rights violation is *also* a crime under domestic or, as in the example above, international law, the investigative body would be able to use the applicable criminal provisions – including modes of liability and *mens rea*, designed to capture other roles, such as those of superiors and accomplices.⁵¹

When the international human rights law violation committed by a State (through its agents) is not criminal in nature, the accountability imperative remains. The investigative body may identify those directly or indirectly involved in the violation, including those who failed to act when obliged to do so.⁵² Beyond criminal justice, some of the means may be provided for instance by administrative measures, political accountability, civil liability or disciplinary measures relating to dereliction of duty.

Where an investigative body finds that a State's legal framework, for example, imposes impermissible restrictions on the human right to freedom of expression, the individuals who establish or implement the policies could be identified, as well as

⁵⁰ Some international human rights treaties directly provide for the involvement of non-direct perpetrators. For example the CAT obliges States to criminalize both direct and indirect involvement. See CAT art. 4 (1): "The same shall apply to ... an act by any person which constitutes complicity or participation in torture." In the case against Hissene Habre under CAT, for example, the former president of Chad was convicted of perpetrating torture directly but also doing so indirectly, under a mode of liability akin to "joint criminal enterprise": Court of Justice of the Extraordinary African Chambers, Trial Judgment of 30 May 2016, para. 2170. While CAT ensures that a State criminalizes the conduct, including that of other, non-direct perpetrators, it does not provide a basis for identifying a perpetrator coming from the upper echelons of a State hierarchy in the sense of "superior responsibility" (note that Habre was also convicted of the war crime of torture, under a command responsibility rubric – see Judgment, para. 2261). The Convention on Enforced Disappearances does capture the conduct of superiors who "knew or should have known" of their subordinates' acts (art. 6 (b)). The Genocide Convention captures conspiracy and complicity (art. 3). The Apartheid Convention prohibits participation, conspiracy, abetting, encouragement and "co-operation" (art. 3).

⁵¹ Domestic criminal statutes will have the means of capturing the conduct of accomplices, superiors and others involved. For international crimes, the Rome Statute (art. 25) employs modes of liability that include ordering, soliciting, inducing, participating, aiding, abetting or otherwise assisting, planning, conspiring, inciting or failing to act when obliged to do so, in particular when in a position of superior or command responsibility. For human rights imperatives on bringing to justice *all* those responsible, see, *inter alia*, Updated Set of Principles for the protection and promotion of human rights through action to combat impunity ("Impunity Principles"), United Nations doc. E/CN.4/2005/102/Add.1, recommended by Commission on Human Rights resolution 2005/81, 21 April 2005, principle 8 (c).

⁵² To make findings on those indirectly involved, it might be helpful to consider the modes of liability used in criminal processes. Also, recall that States are obliged to investigate alleged human rights violations and to provide remedies, and that failure to do so is a distinct violation. Individuals who fail in that respect may also be held accountable.

their superiors and anyone who contributes substantially to the violation.⁵³ Where a non-criminal violation is the responsibility of an entity, such as a parliament or a government ministry, the investigative body might not be able to identify specific individuals, or might choose to identify collectively all the individuals in the entity. Equally, agents of a foreign State who may have contributed to a violation may be identified, owing to the responsibility that flows from their own State's responsibility.⁵⁴

Updated principles to combat impunity

"Investigations undertaken by a commission of inquiry may relate to all persons alleged to have been responsible for violations of human rights and/or humanitarian law, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements. Commissions of inquiry may also consider the role of other actors in facilitating violations of human rights and humanitarian law."⁵⁵

2. Violations of international humanitarian law

The legal parameters of international humanitarian law violations are set out extensively elsewhere⁵⁶ and appear here only in summary form, alongside key aspects relating to the identification of individuals. For these purposes, both a *party* to a conflict and an *individual* can violate international humanitarian law.⁵⁷ Individuals can do so in two ways:

⁵³ Impunity Principles, principles 8 (c) and 27 (b); General Assembly resolution 60/147 (2005), "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", para. 3 (b). See, *mutatis mutandi*, "Draft articles on Responsibility of States for Internationally Wrongful Acts", *supra* note 46.

⁵⁴ *Ibid.*

⁵⁵ Impunity Principles, principle 8 (c).

⁵⁶ See for example OHCHR *Manual on Human Rights Monitoring*, chapter 5, "Applicable International Human Rights and Humanitarian Law Framework", and *International Legal Protection of Human Rights in Armed Conflict*.

⁵⁷ States, when parties to an armed conflict, are responsible for international humanitarian law (IHL) violations when these are committed by its organs, including its armed forces; persons or entities it empowered to exercise elements of governmental authority; persons or groups acting in fact on its instructions, or under its direction or control; and private persons or groups whose conduct it acknowledges and adopts as its own. See International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law Study*, Rule 149. When an individual commits an IHL violation, the State remains "responsible" in the sense of having an international legal obligation to act vis-à-vis the violation.

- By committing the violation themselves personally or by ordering/directing others to commit it; or
- By failing in the responsibilities that attach to leadership (command or superior responsibility, whether civilian or military).

This applies equally to individuals belonging to States or to a non-State actor (NSA) that is a party to a conflict.⁵⁸ Indeed such a relationship is a prerequisite: an individual may not commit an international humanitarian law violation, based on the responsibility of the State or another party to a conflict, unless he or she is a member of, or is acting on behalf of, a party to the armed conflict.⁵⁹ As the above are also forms of participation in international crimes, their contours are taken up in the international crimes section immediately below. Keep in mind, however, that while all war crimes will be violations of international humanitarian law, not all international humanitarian law violations are war crimes. In addition, war crimes may be committed by any individual, irrespective of membership of a party to a conflict or the ability to trigger State responsibility.

3. Crimes under international law

Where an investigation addresses international crimes, it must be cognizant of the legal framework but also of the types of evidence and information that may be used to demonstrate the various aspects of crimes. Criminal law differs from international human rights law and international humanitarian law not only in that it focuses primarily on individual responsibility,⁶⁰ but because it requires proof of additional elements, namely a mental element (*mens rea*) and a “mode of liability”.⁶¹

International crimes differ from *domestic* crimes not only in terms of the applicable law, but also in the context in which they are committed. For example, an armed conflict is a necessary prerequisite for the commission of war crimes,⁶² and a “widespread or systematic attack on a civilian population” is necessary for crimes

⁵⁸ Ibid. See also Rule 139.

⁵⁹ See the ICRC’s Customary IHL Study, Rule 149, setting out four categories of individuals or groups that can engage the responsibility of a State. Note that such is not the case for war crimes. While they are generally accepted as certain violations of IHL, war crimes may be committed by any individual, irrespective of membership of a party to a conflict or the ability to trigger State responsibility, as mentioned above.

⁶⁰ “Individual criminal responsibility” is the rubric under which persons have been found guilty and punished at the international level for criminal acts. There is jurisprudence and practice on the criminal responsibility of legal persons and entities, but such discussion is beyond the scope of this note.

⁶¹ As employed in this guidance, the term “mode of liability” describes the role the individual played vis-à-vis other perpetrators, if any, including whether they were in a position of authority over others committing crimes.

⁶² Another war crimes chapeau is that the crime had a “nexus” to the conflict, meaning that it “took place in the context of and was associated with” an armed conflict. See Rome Statute, Elements of Crimes, art. 8, War Crimes, Introduction, para. c. For more coverage on the nexus requirement, see annex I.



Fatou Bensouda, Chief Prosecutor for the International Criminal Court, briefs the United Nations Security Council. UN Photo / Eskinder Debebe

against humanity.⁶³ These and other elements are sometimes referred to as “chapeaux” or “contextual elements”, and will be spelled out in the statute, or the domestic or customary law, governing the conduct.

Domestic criminal justice systems globally have different elements, descriptions and categorizations of crimes.⁶⁴ This guidance is aligned primarily with the law and practice of the International Criminal Court (ICC), given its role in international criminal law and the Rome Statute’s broad membership. Jurisprudence from other international tribunals is also germane.

⁶³ Rome Statute, art. 7.

⁶⁴ States also have obligations under international law to criminalize in their domestic law certain human rights violations, such as human trafficking or individual acts of torture. An investigative body may also identify individuals perpetrating such crimes (see “Crimes under domestic law”, below).

In international criminal law, three areas should be proven to support an allegation that an *individual* is *criminally* responsible for conduct:

- (a) The chapeaux or contextual elements (e.g., armed conflict, nexus);
- (b) All elements of the prohibited act as defined in the substantive law, i.e., the *actus reus*, including the *mens rea*;⁶⁵
- (c) The perpetrator fulfilled the criteria of a “mode of liability”.

Also to be considered is:

- (d) Whether any defences absolve the individual of responsibility.⁶⁶

As explained elsewhere, Commissions of Inquiry and other investigative bodies do not apply the same standards of proof applied in criminal investigations, and do not have the powers and, typically, resources attached to courts. An investigative body may conclude that a particular individual is responsible for an international crime when the adopted standard of proof is met with respect to each aspect from (a) to (c). When investigating the involvement of individuals in violations and crimes, investigative bodies should not only consider information that implicates individuals but also information that may exonerate them, in line with the principle of impartiality.

Darfur (2005)

“To render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be suspected to be responsible, and the enumeration of the various ‘modes of participation’ [modes of liability] in international crimes under which the various persons may be suspected of bearing responsibility.”

Report of the International Commission of Inquiry for Darfur, 2005, para. 530

⁶⁵ As noted, the content or “elements” of the crimes themselves are generally set out in the statutes of international tribunals, in domestic legal regimes, or in customary law. The actions or omissions of the person(s) who participated in – or perpetrated – the crime (e.g., shooting a weapon, torturing, detonating a bomb, failing to punish subordinates who committed crimes) are often referred to as the *actus reus*. Evidence of the crime having occurred is known as “crime-based evidence”. *Mens rea* involves the intentionality or “mental state” of the actor, including what they knew and what they intended to achieve with their actions or omissions. It is a subjective element, not to be confused with “motive”, which refers to the outside events or triggers that prompted the perpetrator to undertake the crime (e.g., financial gain or revenge). Lower standards of proof typically employed by CoIs and similar investigative bodies make it easier to infer the existence of the requisite *mens rea*. When such inferences are drawn, this should be spelled out in the report.

⁶⁶ In the Rome Statute, the defences are set out in art. 31.

Command or superior responsibility

When superiors do not uphold their “command responsibility”, international criminal law holds them responsible for the criminal actions of their subordinates. Liability attaches to all levels of a hierarchy so long as the following criteria are met:

The commander/superior:

1. was in “effective control” over the relevant subordinates;⁶⁷
2. *knew or, owing to the circumstances at the time, should have known* of the crimes perpetrated or about to be perpetrated;⁶⁸ and
3. failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of these crimes or to submit the matter to the competent authorities for investigation and prosecution.⁶⁹

Where these elements can be proven to the adopted standard, the commanders/superior(s) should also be identified as bearing responsibility.

4. Crimes under domestic law

Rarely does a country’s *domestic* law form the legal basis for United Nations investigations. When this does occur, a thorough understanding of the law and practice of the State’s justice mechanisms will be indispensable to the investigation. The variations in legal systems globally will require the investigative body to avail itself of considerable domestic legal expertise. Investigations should proceed with exceptional caution if rendering findings based on domestic law, and may consider qualifying their findings accordingly.

⁶⁷ Rome Statute, art. 28; also Additional Protocol I to the Geneva Conventions, art. 86 (2) and Celebici Appeal Judgment, para. 254 (“[Authority] need not be established in the sense of formal organizational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.”).

⁶⁸ Rome Statute, art. 28 (a) (ii). Note that for civilians in positions of authority the standard under the Rome Statute is: “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” Art. 28 (b) (i).

⁶⁹ Ibid.

B. Standard of proof

Also known as “degree of certainty” or “evidentiary threshold”, a standard of proof is that point on a spectrum, between conjecture and absolute certainty, above which an allegation is accepted as proven and below which it is not. Standards of proof⁷⁰ for CoIs and FFMs are set out in *Guidance and Practice*,⁷¹ but are taken up here because they hold particular relevance when making findings on an individual’s responsibility.

Proving the elements of a crime to the criminal standard of “beyond a reasonable doubt” is not expected in a United Nations human rights investigation, particularly considering the lack of police or judicial powers (subpoena, contempt, or special investigative techniques such as wiretaps, surveillance, etc.), the possible difficulties in accessing the information necessary to prove all the elements, and the typically tight reporting deadlines. Most United Nations investigations apply the “reasonable grounds to believe” standard, which is also the one recommended by OHCHR. Meeting this standard means that factual information has been collected which would satisfy an objective and ordinarily prudent observer that the incident has occurred as described with a reasonable degree of certainty.⁷² The standard of proof must be applied to both of the determinations relevant in identification: (a) that the violation or crime occurred, and (b) that the individual identified was responsible.

Investigations must apply the standard to every element that defines the violation or crime, such that no finding of responsibility may be made if any element fails to cross the threshold. In cases where the threshold is not met, an investigation can recommend that further investigation should take place.⁷³

⁷⁰ Standards of proof are employed in a variety of legal settings including civil, administrative and criminal law. Examples include “beyond a reasonable doubt”, “clear and convincing”, “balance of probabilities”, “reasonable grounds to believe”, “reasonable suspicion” and “prima facie”.

⁷¹ OHCHR’s *Guidance and Practice*, section IV (C) (7), p. 62.

⁷² OHCHR methodology also requires that violations be reported as having occurred only if corroborated. Corroboration may occur through multiple independent sources, one of whom may be the victim. Similarly, corroboration may be achieved via a clearly documented pattern of events, or through a reliable body of information consistent with other material tending to show that a violation, incident or event has occurred.

⁷³ “Report of the International Commission of Inquiry on the Libyan Arab Jamahiriya” (A/HRC/17/44), para. 219 (further investigation necessary for specific instances of rape and sexual violence). More on the fundamentals of individual criminal responsibility can be found in annex V (“Sources”), the Rome Statute, and Rule 151 of the ICRC Customary IHL Study (war crimes). More on the operation of modes of liability and *mens rea* can be found in arts. 25, 28 and 30 of the Rome Statute.



United Nations Security Council members visit the Rohingya refugee camp in Bangladesh.
UN Photo / Caroline Gluck

Example 1: International human rights law

An FFM employing the “reasonable grounds to believe” standard of proof is investigating the human rights violation of enforced disappearance. At the close of the investigation there must be reasonable grounds to believe that:

1. A person was detained or otherwise deprived of their liberty;
2. The deprivation of liberty was carried out by State agents, including persons or groups acting with the authorization, support or acquiescence of the State,⁷⁴ and

⁷⁴ Or others who can invoke State responsibility, from among those on the list set out above in note 46.

3. Those responsible refused to acknowledge the detention, or concealed the concerned person's fate or whereabouts, placing the person outside the protection of the law.⁷⁵

If corroborated information pertaining to any of these three elements fails to reach the reasonable grounds standard, the investigative body will not find the State, nor any individual, responsible for the violation of enforced disappearance.

Example 2: International criminal law

An investigative body using the same standard has collected evidence that a party to a non-international armed conflict launched an attack directed against civilians.⁷⁶ It has also uncovered the name of the commander who led the unit that undertook the attack. In determining whether to identify the commander as responsible for a violation, there would need to be reasonable grounds to believe that:

1. The commander directed the attack;⁷⁷
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;
3. The commander intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack;
4. The conduct took place in the context of and was associated with an armed conflict not of an international character; and
5. The commander was aware of factual circumstances that established the existence of an armed conflict.

⁷⁵ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2. In this example the Col is not alleging a crime against humanity, so the chapeaux and other elements of that crime are excluded.

⁷⁶ Recall that for this body of law to apply, the chapeaux elements relating to "armed conflict" must also be met. See supra section 3 A.

⁷⁷ This example employs the substantive law from art. 8 (2) (e) (i) of the Rome Statute. The mode of liability is "direct commission". The *mens rea* comprises intent and knowledge (awareness).

When sufficient information exists to show that each of the above elements crossed the selected evidentiary threshold, the investigative body can identify the *individual* commander as being responsible. The same analysis could be done for other individuals in the unit under different modes of liability, for example those who may have assisted in the attack, or, under the doctrine of “command responsibility”, the superiors of this commander.

Standards of proof are an important mechanism for ensuring legal consistency across the entirety of the investigative body’s findings.

C. Investigations

The increase in mandates calling for the identification of individuals has ushered in changes in investigative approaches.

- Violation and crime-base information is joined by “linkage” information, tying a hierarchy’s upper tiers to the violations and crimes of the rank and file.
- Individuals are added to States as the focus of investigation.
- International criminal law is increasingly the legal basis, alongside international human rights law and international humanitarian law.
- Some investigative bodies are dedicating staff specifically to the task of identifying responsible individuals.

As the variables in investigations are enormous and the fundamental aspects have been covered elsewhere, this guidance is limited to investigative methodology and policy that is specific to the identification of individuals, with a particular focus on how it should be adapted for the type and level of individuals being investigated.

1. Investigation planning

Planning the investigation is an integral part of the entire investigation cycle,⁷⁸ and the means and methods of identifying individuals must be well thought through and integrated into the broader planning.⁷⁹ Irrespective of whether a list or dossiers of

⁷⁸ See also OHCHR *Manual on Human Rights Investigations* (forthcoming), chapter 4, “Investigation Planning”. For a visual representation of the human rights investigations process, see *Guidance and Practice*, p. 36.

⁷⁹ The design of investigation plans is covered in *Guidance and Practice*, p. 38. Annex I to this text contains excerpts from a model investigation plan showing portions relevant to the identification of responsible individuals.

individuals will be compiled, and whether any such information will be made public or kept confidential, the investigation plan should, as a minimum, devote attention specifically to securing information that demonstrates individual responsibility. At a maximum, it may draft an entire investigation plan dedicated to gathering information on responsible individuals, especially if the mandate calls for this. The plan should be detailed, and should set out the human resources, legal foundations, witness/victim protection mechanisms, risk mitigation measures, investigative avenues, methods and priorities that will guide the investigative body's work. It should also set out appropriate security and confidentiality protocols, which may go beyond standard procedures, for example by limiting the circulation and availability of information within the team and putting in place controls on the sharing of information relating to individual identification.

(a) *Whom to investigate*

Investigations will rarely be able to address every crime or violation under their mandate. Focus and prioritization will be required, and these should be based on the time and resources available, the manner in which the mandate was interpreted, the applicable legal framework, and context-specific factors such as access and – in armed conflict situations – the intensity of the hostilities.

Level

During planning, consideration should be given to the *level* of the individuals to be identified. There is an implicit, and at times explicit, focus on those “most responsible” or those particularly high in the command structure.⁸⁰ The higher the individual's rank or position, the more that person is able to influence events and the greater the number of people likely to be affected by their decisions. Meanwhile, information on individuals who comprise the “rank and file” might only be recorded incidentally. However, victims and witnesses usually identify “direct perpetrators” (those actually pulling the trigger), with the result that investigations may end up focusing on those individuals by default, simply because the information is more readily attainable.

⁸⁰ The phrase “most responsible” may be open to interpretation. In 2016, the ICC's Office of the Prosecutor published a policy note setting out its understanding: “The notion of the most responsible does not necessarily equate with the de jure hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence [and] ... will be assessed on the basis of, inter alia, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity.” See Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016, paras. 42-44.



United Nations Police conduct interviews in Minova, in the DRC. UN / OHCHR Photo

Investigative bodies have uncovered sexual and gender-based violence (SGBV), and have found that it was undertaken systematically. Sometimes lacking is analysis on whether there were orders to commit sexual violence or whether it is possible to identify superiors who failed to exercise their command responsibility. Such identification requires analysis of how large numbers of sexual violence incidents can be linked to decisions made at, and information available to, the top of the hierarchy.

De jure versus de facto leaders

When assessing whether a given commander is in “effective control” of subordinates implicated in crimes and international humanitarian law violations (see “Command Responsibility”, above), an investigative body must not rely solely on de jure chains of command. It may be that the commander within the formal hierarchy has little real control, while the individual truly in charge is a militia leader or someone outside the formal chain of command.⁸¹ Information from insiders or defectors can be particularly valuable in proving effective control (see Annex III).⁸²

Impartiality

The professional obligations of all United Nations personnel require independence, impartiality and objectivity. This means in principle that the investigation should cast a wide net and give no consideration to who gets caught in it. Nor are United Nations-mandated investigations “adversarial” in the common law sense; they should have no motivation to prove or disprove violations or criminal conduct. In addition to seeking out information that implicates individuals, therefore, the investigative body should also be aware of the potential for information that may exonerate a person. The investigation should strive to hear all sides of the story, including by interviewing individuals who are implicated, assuming they can be safely accessed and that such an interview does not place sources or other individuals at undue risk. [See text box below: Interviewing allegedly responsible individuals.] This does not mean that the results of identification have to be “balanced” in numbers, but rather that an equal effort to identify is to be made on all sides of a political divide, including by actively counterbalancing if information on perpetrators from one side is simply easier to find than information on perpetrators from the other. In the end, the findings are made as objectively as possible, based on the sum total of information gathered.

⁸¹ *The Prosecutor v. Ignace Bagilishema* (Trial Judgement), ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001, para. 39 (“Decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates.”).

⁸² Particularly valuable are witnesses who are able to describe how orders were given and carried out, and by whom. Examples of a commander disciplining subordinates, with what means and for what purposes, is relevant. Carrying out disciplinary measures shows that the commander not only had control but was wielding it.



Wartime destruction of civilian property in Kosovo. UN Photo / Olivier Salgado

Example 1: MONUSCO 2013

In May 2013 the United Nations Joint Human Rights Office (UNJHRO) released a report on violations perpetrated by soldiers of the Congolese armed forces and combatants of the M23 in Goma and Saké, North Kivu, and in and around Minova, South Kivu. The findings of the report were the result of monitoring activities of several field investigations conducted by the UNJHRO during which more than 350 interviews were conducted with victims and witnesses. In the scope of their investigations in Minova, UNJHRO staff also interviewed military authorities to hear their version of the events. Staff held follow-up meetings with military judicial authorities from North and South Kivu and provided support to those authorities in the scope of their investigations into violations.⁸³

⁸³ See "Report of the United Nations Joint Human Rights Office on Human Rights violations perpetrated by soldiers of the Congolese armed forces and combatants of the M23 in Goma and Saké, North Kivu province, and in and around Minova, South Kivu province, from 15 November to 2 December 2012" (available at http://www.ohchr.org/Documents/Countries/CD/UNJHROMay2013_en.pdf), para. 5.

Example 2: Col Libya 2012

In the course of its investigations in Libya, the Col examined allegations levelled at North Atlantic Treaty Organization (NATO) forces which, acting under a United Nations mandate, were carrying out airstrikes against pro-government forces:

“A number of NATO airstrikes, however, were the subject of allegations of civilian casualties, which the Commission investigated. Allegations of civilian casualties during the conflict came from the then Libyan government, which it alleged amounted to an indiscriminate attack on civilians, or media reports. Others were reported by witnesses during the Commission’s field missions. Some of these claims were backed up by evidence subsequently gathered by the Commission.”⁸⁴

...

“The Commission found no evidence on the ground, or through satellite imagery analysis, that the site had a military purpose. On the basis of the information received by the Commission, it seems clear that those killed were all civilians. NATO’s response to the Commission did not provide an adequate explanation of the military value of the target, nor an explanation of the second strike.”⁸⁵

...

“NATO first stated the houses were not the target of the attack and they may have been hit due to a weapon malfunction. Later, in a letter to the Commission, NATO said the intended target was the Tarabalus SA-2 Support Facility. However, NATO stated the weapon impact was not observed and NATO was unable to determine where it landed, though they acknowledge it was possible the errant bomb caused the casualties.”⁸⁶

The Libya Col had an allegation of indiscriminate shelling that was apparently supported through its investigation on the ground. When it approached NATO, as the alleged perpetrator, for their version of events, some facts were clarified while others were not. The investigation demonstrated its impartiality by pursuing sources from various sides of the incident.

Good practice: Where an investigative body has **sufficient time and resources**, it may consider creating a mechanism inside the secretariat to help ensure its findings

⁸⁴ A/HRC/19/68, para. 610.

⁸⁵ Ibid. para. 625.

⁸⁶ Ibid. para. 628.

are impartial. When it has been decided that the threshold is reached with respect to a responsible individual, one staff member who has not been involved in the collection or analysis of the evidence serves as “devil’s advocate” and challenges the findings, putting forth counter arguments and evidence to the extent that they exist. By introducing these or similar checks, the investigative body will be more likely to achieve results that are legally and factually impartial.

Additional considerations on whom to investigate

- A focus on international crimes tends to result in findings of responsibility primarily among the security forces. By concentrating also on serious human rights violations, other key figures bearing responsibility, including senior civilian leaders, may be held to account.
- Equally, civilian leadership (State and de facto authorities) is to be investigated also for international humanitarian law and international criminal law violations where command or superior responsibility is at issue.
- Consider also persons who facilitate violations from abroad, e.g., diaspora financing armed groups or inciting genocide, providers of weapons and intelligence used for violations, foreign officials engaged in refoulement or extraordinary rendition, etc.

Building dossiers on individuals at any level is time-consuming work, but it tends to take comparatively more time as one moves up the hierarchy. The converse may be true, however, for those implicated at the highest levels of government and the military: senior leaders are more likely to make public appearances and pronouncements, which can facilitate the collection of information on their knowledge of events.

(b) Mapping and recording actors and entities

A step fundamental to any process of identifying responsible individuals is generating an “actor map”, often a visual or electronic representation of key actors and their roles, as well as the relationships between them.⁸⁷ Actor maps include not only individuals, but also State institutions and entities, armed groups where relevant, and the key individuals involved in or leading them. They are often accompanied by spreadsheets containing detailed information as well as organization charts depicting hierarchies within an entity (see Annex II for a non-prescriptive example of

⁸⁷ See OHCHR *Manual on Human Rights Monitoring*, chapter on “Analysis”.

tools to assist in generating actor maps). The exercise is essential for ensuring that information is sought in a systematic and methodologically consistent manner.

The challenge is to create and maintain such tools within the constraints (mostly time and resources) that affect all investigations. Information frequently arrives in inconsistent ways: a small piece from one interviewee who is reliable; a large portion of detailed information from another who is less so, and so on. Open-source information can make a significant contribution in this respect, but its credibility must be scrutinized, as with all sources. Actor maps help manage this diversity of source material.

Investigations generally begin by canvassing available information from reliable open sources, and proceed by filling in missing pieces as the investigation progresses. Mapping actors and entities is no different: publicly available information on potential perpetrators is recorded and updated as further information is gathered. **Good practice** is to include ratings on the **credibility** of the information and the **reliability** of the source, in order to assess the level of confidence in each such identification.

Example 1: Sri Lanka 2015

In its public report the OHCHR Investigation on Sri Lanka (OISL) set out the Sri Lankan military and security structures involved in hostilities during the latter periods of the conflict. Over 27 paragraphs described in detail – in some cases using organization charts – their functions, leadership (including names) and manner of involvement. Much of that information was gathered from publicly available sources:

Task Force:

“This was an ad-hoc grouping put together for a specific task requiring a separate formation command. It was hierarchically equivalent to a division, but had the size of a strong brigade. It comprised a mixture of existing units “borrowed” from other formations and new units that were raised by new recruitment during the rapid expansion of the army. According to maps compiled by the Defence Ministry, Task Forces 2, 3, 4 and 8 were particularly involved in the final weeks of the conflict. According to the Ministry of Defence website, the following were Commanders of Task Forces: Brigadier Rohana Bandara (Task Force 2); Brigadier Sathyapriya Liyanage (Task Force 3); Colonel Nishantha Wanniarachchi (Task Force 4); Colonel G.V. Ravipriya (Task Force 8).”⁸⁸

⁸⁸ A/HRC/30/CRP.2, 2015, para. 119 (emphasis added).

Other maps are also helpful, such as those detailing camps or places where violations occurred. A detailed chronology of events that is linked to locations and to individual units and command structures should be a priority for all investigations.

(c) “Linkage evidence”

So-called linkage evidence is information “linking” mid- and higher-level commanders to the violations or crimes of their subordinates, in what may be referred to as “multi-level investigation” because it involves making a connection between the perpetrators at ground level and those higher up the chain of command. It is relevant not only for showing responsibility for international crimes, but also for demonstrating that certain leaders acted as agents of human rights violations. For example, linkage evidence can help prove that a particular decision maker ordered, or was otherwise complicit in, unlawful surveillance, censorship or a discriminatory practice.

Understanding how to demonstrate these links is especially helpful when an investigative body is confronted with complex political and military structures. Aside from direct eyewitness and defector accounts, documentary linkage information such as official records, military annual reports, official press releases, public statements, websites and other publications or archives can be highly probative. Written materials that tend to show the existence of hierarchies, and who within those hierarchies wields de jure command, are also relevant – though again, de facto rather than de jure control must ultimately be shown. Logistics and supply reports, for example, can show when specific units were at specific places and that the commander signing the papers probably knew they were there. The documentation of patterns can show that specific sets of violations must have been ordered by individuals at the top of the hierarchy. Particular challenges are posed in seeking “linkage evidence” when investigating armed groups, as – especially early in an armed conflict – their administrative procedures may often be less developed or thorough. Other sources such as social media, defectors or detainees may prove more valuable. Thinking through the various ways to secure linkage evidence should be a core part of investigation planning.

Example 2: Guinea 2009

“Shortly after the events, the President complained about his undisciplined army. However, he also demonstrated considerable control over the military, since the regular army obeyed his orders, transmitted through the chief of staff of the armed forces, to remain in their barracks throughout the day, despite the seriousness of the events taking place in the city. Furthermore, the President’s 2 November 2009 decision to promote all senior non-commissioned officers and non-commissioned officers of the army – including those who were members of the branches of the army that took part in the 28 September events – to a higher rank with effect from 23 December, would appear to indicate that their acts were perpetrated with the President’s blessing.

“227. The Commission has gathered considerable information on the well-organized and coordinated efforts made to cover up the crimes committed; the security forces that perpetrated the crimes were behind those efforts. The President did nothing to prevent or stop those efforts.

“228. The Commission therefore finds that there is sufficient evidence showing that President Moussa Dadis Camara incurred military command responsibility for the crimes described in this report.”⁸⁹

The extent to which an investigation can uncover linkage evidence will be a combination of, inter alia, resource allocation and context. At a minimum, investigative bodies should record information received together with an assessment of its credibility. When time and resources permit, the investigation should actively pursue such information, analyse gaps, and target future efforts at closing those gaps – storing all such information in a regularly updated actor map. Securing quality linkage information can be difficult and human-resource intensive: the extent to which it is pursued is to be balanced against other investigation priorities.

⁸⁹ “Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea” (Guinea Report), S/2009/693, para. 226.



Mongolian peacekeepers of the 8th Contingent trained at the Tavan Tolgoi Peace Operations Support Training Centre before deployment to protect the Special Court for Sierra Leone.

UN Photo / Eskinder Debebe

(d) Integrating a gender perspective⁹⁰

To integrate a gender analysis into the identification and profiling of perpetrators, investigators should distance themselves from stereotypical beliefs which tend to focus predominantly on men as perpetrators. Men, women and others can commit human rights violations and crimes. Meanwhile, a gender analysis ensures that the power structures and dynamics that compelled each of them to participate in such conduct – the effects of which vary significantly according to one’s gender – are taken fully into account.

⁹⁰ For further information see OHCHR *Guidance Note: Integrating a Gender Perspective into Human Rights Investigations by Commissions of Inquiry and Fact-Finding Missions* (forthcoming). The information here has been partly adapted from that text. See for example pp. 16-24 on investigation preparation.

When mapping actors/perpetrators, investigators should thus be aware of the fact that structural power imbalances in society may lead them to treat victims of human rights violations as potential perpetrators, which may in turn exacerbate discrimination. Some victims of violations appear to support or to participate actively in militias or armed groups because they are forced to do so or otherwise lack meaningful choices. For example, girls have been kidnapped by members of an armed group, forcibly married to their captors and then coerced to bear children who would be shunned by their original communities. Investigators have reported that women and children rescued from Boko Haram, who may have little or no connection with violence or the group's ethos, have been treated as fully fledged members, including by being enrolled in "de-radicalization" programmes.⁹¹

Past investigations have identified women alleged to be suicide bombers involved in indiscriminate attacks, alleged to have recruited children into armed groups, alleged to have gathered intelligence, disseminate propaganda and enforce female morality codes. Others have allegedly lured enemy fighters into ambushes where they were captured, tortured and/or killed. Women and girls may also play traditional gender roles, such as providing food or other domestic services for armed groups. In some instances, these roles have been understood as facilitating or "materially supporting" armed groups, and such allegations have been used to disproportionate effect against girls and women, for example by denying them asylum,⁹² when in fact they may have participated under duress.

Over the last two decades a growing number of countries have increased the percentage of women in their armed forces, and in ever-broadening roles.⁹³ It is now increasingly common for militaries and other fighting forces to integrate women, or alternatively, to have women-only brigades.⁹⁴ Investigators must therefore bear in mind the importance of recognizing that women and others can be key sources of information on military matters. Investigators should seek information from a broad range of interlocutors on military structures and hierarchies, types of weapons, deployment dates and places, insignia, means of communication, and similar potentially probative facts.

⁹¹ A/HRC/30/67 (29 September 2015), para. 31.

⁹² A/64/211 (3 August 2009), para. 50.

⁹³ United Nations Global Study on the Implementation of United Nations Security Council resolution 1325, *Keeping the Peace in an Increasingly Militarized World*, chapter 6, pp. 137-139.

⁹⁴ *Ibid.* p. 137. For example, by 2013 all NATO countries had specific policies and legislation for women's participation in their armed forces. Non-State actors also increasingly deploy women: the LTTE in Sri Lanka, for example, had two all-female brigades. In Syria, multiple armed groups have recruited women to fill their ranks, such as the Kurdish People's Protection Units (PKK), of which women comprise as much as 40%.

(e) Information sources in investigation planning

Another primary consideration when planning investigations that focus on identifying individuals is the nature of access afforded. This includes not only access to locations, material evidence and witnesses, but access to the sources of linkage evidence (see above). Rapid changes in technology and ICTs⁹⁵ have impacted investigations, opening up new channels of communication that in turn afford new kinds of access to sources. Certainly, investigation methodology must seize these technologies and put them to maximum use, but traditional investigative methods should not be abandoned. Poring over documents and archives may produce as much probative information as a recently posted video. While investigations should begin, at a minimum, with information available in the United Nations itself – for example from desk officers, field presences, special procedures, the Department of Peacekeeping Operations, etc. – a wide range of sources should be considered in the planning process and exploited as relevant. A non-exhaustive list follows:

Individuals

- **Insiders and defectors** – thanks to their knowledge of a military's inner workings, they are probably the best source of information to link the rank and file to the upper echelons, although investigators must take particular care to assess the personal motivation for each piece of information divulged in light of the individual's potential criminal conduct.⁹⁶
- **Victims/survivors and eyewitnesses** – direct testimony from those who saw or experienced the event are key. They might identify the individual involved or describe the particular actions s/he took. Colleagues, friends, family and bystanders are typical providers of direct, eye-witness evidence.⁹⁷

⁹⁵ Internet Communication Technologies (ICTs)

⁹⁶ See "Perpetrator-targeted questioning", below. Interviewing insiders and defectors is a particularly sensitive area given security concerns and the potential to affect future judicial processes. It should be undertaken by trained investigators, after they have received legal guidance.

⁹⁷ There is concern that interviewing witnesses multiple times, for example once by a Col and again by prosecutors in a criminal trial, might impact testimony, especially in children. See "A Case Study of Witness Consistency and Memory Recovery Across Multiple Investigative Interviews" by Yael Orbach, Michael E. Lamb, David La Rooy and Margaret-Ellen Pipe, Applied Cognitive Psychology, University of Cambridge, Cambridge, UK (2011). Available at: <http://www.researchgate.net/publication/227714578>. With the exception of situations where "re-traumatization" is an issue, however, the impact of multiple interviews is not necessarily negative, and can potentially even reinforce memory of events.

- **National authorities and leaders of armed groups**, in particular those allegedly involved in violations (to the extent that they can be accessed without undue security risks for the investigation or its sources).⁹⁸
- **The refugee or internally displaced population** – in light of their having fled areas where hostilities took place and their ability to describe those who may have been responsible.



Human rights officers investigate violations. UN Photo / Marco Dormino

⁹⁸ What may be referred to as self-incriminating information in criminal proceedings (sometimes referred to as “admissions against interest”), provided by national authorities, armed group leaders and suspected individuals, whether in public or private, has a high probative value. It may indicate their knowledge of relevant facts and perhaps even orders (whether direct or implied) to commit violations. When interviewing such individuals, human rights investigations should generally not volunteer assurances that the interview will be kept confidential.

Telephone, internet based communication tools (e.g., Skype) or related technology may assist in reaching otherwise inaccessible areas. It may be necessary to communicate with Internally Displaced Persons (IDPs) and others inside the country who are in areas affected by hostilities, or who may have knowledge of responsible individuals, using methods that are innovative but for which ensuring information security remains paramount.

- **Nationals, diasporas and “expats”** in neighbouring countries – while they may not have been present themselves during hostilities, they may be in networks or have contact with people who were; they may know the names of various people in leadership positions, and/or may be aware of when and to where high-level figures or others relocate.
- **Experts:**
 - **Military expertise** – to explain the organizational structure of a military unit, operational planning and execution protocols, and/or the range, effects, characteristics, targeting protocols, etc., of a certain weapon;
 - **Forensic, ballistic** or other scientific expertise, such as **chemical** or **medical**, from an independent and professional source.
- **Professionals** inside the country or in neighbouring countries, such as doctors, lawyers, journalists, religious leaders, United Nations⁹⁹ or non-governmental organization (NGO) staff who may be involved, for example, in humanitarian or reform efforts. They may have knowledge of the names of individual leaders or which units were deployed where.

Materials/Information

- **Documentary information** such as archives, medical records, death certificates, administrative records, payroll, letters and memos, bills – provided they can be authenticated (see below).¹⁰⁰

⁹⁹ In crisis situations the United Nations is often present in multiple roles. Uniformed components of peacekeeping operations, including both military and police, as well as other personnel working on security issues and/or with security forces, can be good sources of information.

¹⁰⁰ Investigators are generally encouraged to take a photocopy or scan of such texts.

- **Observable physical evidence** such as tracks and footprints, clothes, bullet or shell casings; observations made at the site of a human rights violation or a crime scene, such as distances between objects, layout of an area, visibility from various vantage points, terrain. Taking photos or video of the scene, where possible and secure, is generally encouraged.
- **Imagery, photos and videos** – imagery such as that from satellites¹⁰¹ or drones, which might locate a certain type of tank or artillery piece at a given moment, or civilian objects (satellites can also provide before and after images of areas exposed to attack, for example to show destruction or the location of disturbed earth or gravesites); photos and videos – where they can be authenticated (i.e., the source can be verified to the relevant evidentiary standard) and photos taken by the investigators.

Official open sources¹⁰²

- **National laws and policies and national court records** – of the government concerned, as well as internal documents, provided they were received from a reliable source and their authenticity could be confirmed;
- **Military and security forces’** websites and materials;
- **Social networks** (Twitter, Facebook, YouTube, Snapchat, etc.) and other means of communication deemed to be the “official” sources for non-State actors, or that suspects might use.

Other open sources

- **Research and reporting** by civil society, human rights defenders (HRDs), think tanks, institutions and analytical organizations.
- **Media reporting** (including print, radio, television and online).

¹⁰¹ OHCHR has a memorandum of understanding in place with UNITAR/UNOSAT (United Nations Operational Satellite Applications Programme) to provide imagery and analysis.

¹⁰² See below, section (c), “Publicly available information, open sources and social networks”.



Human rights officers investigating discrimination in Nepal meet with children.

UN / OHCHR Photo / Robert Few

- **Reports by United Nations** and other intergovernmental organizations (Special Procedures, Office for the Coordination of Humanitarian Affairs, Office of the United Nations High Commissioner for Refugees), including internal reports and analysis; cooperation with United Nations peacekeeping missions and sanctions committees.
- **Analysis-based information** – for example demonstrating – through various types of information collected, such as statistics, surveys and other quantitative information – that a certain pattern or “signature” of conduct exists.
- **Contact with the government concerned**, such as formal requests for information from governmental institutions as well as public statements officials may have made, including to the human rights mechanisms (treaty bodies, Human Rights Council, Universal Periodic Review, etc.).
- **Contact with parties** – in the context of armed conflict, communication with the parties may include seeking information from them or affording them the right of reply, for example.

- **Contact with other governments in the region** and regional organizations that may have relevant information, including diplomats who had contact with officials in the State under investigation.
- **Contact with militaries and intelligence agencies in the region**, for example military personnel involved in regional trainings, or who might have gone to the same military academies, or might have known each other before the period under investigation, etc.

The investigation should not encourage third parties to produce or collect information by means that are not in conformity with human rights standards, or information that was collected, used or stored without due regard for the safety and security of sources and others who may require protection. If such information is offered, its probative value has to be carefully weighed against any impact its use may have on the perceived integrity of the investigation, and against the likelihood that it may encourage such practices in the future. Investigations must never accept evidence adduced through torture.

Investigative practice and OHCHR policy are both clear that United Nations human rights investigations do not normally gather physical evidence of violations and crimes.¹⁰³ This is in part because, as temporary bodies, Cols/FFMs and similar investigations are not in a position to safeguard the evidence over time, and in part so as not to disturb the sites of violations or crime scenes or to hinder subsequent criminal or other investigative processes.¹⁰⁴ The above sources and investigative avenues can be canvassed with minimum effect on any subsequent court cases.

Planning is critical to the success of an investigation, while, in the context of complex investigations, flexibility is also a necessity. Situations evolve, access changes, information sources come and go, levels of cooperation fluctuate. Despite careful planning, investigative bodies looking for information on responsible individuals must be able to react and to adapt their approaches and tactics to the circumstances.

¹⁰³ This practice could evolve as differing mandates, such as that of the International, Impartial and Independent Mechanism, are envisaged and roles different from those of traditional investigative bodies are called for.

¹⁰⁴ See *Guidance and Practice*, p. 54. Investigators would not normally take fingerprints or blood samples, or remove a bullet casing from a crime scene, for example. In line with policy, investigators should only ever consider taking possession of physical evidence when convinced that the evidence is crucial for subsequent legal processes and that it risks being destroyed or otherwise made permanently unavailable and they are prepared professionally to secure the item(s) properly.

2. The investigation process

Once the investigation plan is in place, information collection begins in earnest. Various resources exist within OHCHR covering the methodology and good practices in investigations per se. For example, the mechanics of interviewing sources is covered in depth in OHCHR's *Manual on Human Rights Monitoring*.¹⁰⁵ The same manual covers "informed consent" and "source protection", among other fundamental issues. As elsewhere, this section therefore addresses areas of investigation specific to the identification of responsible individuals, setting out the minimum requirements together with further measures to be taken if time and resources permit.

(a) Practices for ensuring a range of perpetrators

Identifying responsible individuals entails the risk that investigators may become too narrowly focused. Circumstances may dictate, for example, that the easiest witnesses to reach point to crimes by only one party, or that the most accessible areas to investigate relate only to a certain type of violation. Violation- or crime-based evidence may be more accessible than linkage evidence. While it is not necessarily the case that "all parties commit crimes", that they are being perpetrated everywhere, or that the leadership is responsible, a thorough investigation explores leads and information that will reveal events across all relevant areas and relating to a broad range of potential individuals. When time and resources allow, **good practices** in this area include:

- Assigning an investigator to a particular party (or parties) to the conflict with responsibility to map the structures in that party and/or identify responsible individuals;¹⁰⁶
- Ensuring that the full geographical area of the conflict or country is covered. Areas where there are fewer publicized violations could mean a more repressive environment, or that fewer refugees/IDPs managed to flee the area, rather than fewer violations occurring. Investigators may consider phoning/electronic communication (with due consideration for security and protection) for areas that are physically unreachable, or where access has not been provided;
- Seeking out defectors or insiders from different parties;

¹⁰⁵ See OHCHR *Manual on Human Rights Monitoring*, chapter 11, "Interviewing".

¹⁰⁶ This is not to suggest that this is the only task undertaken by the investigator. Also, the practice may be less relevant in non-conflict scenarios. Assigning an investigator to specific branches or agencies of the government or to a non-state actor or elements of it might nevertheless help to ensure that the investigation casts a broad net.

- Reflecting within the team about information that at first glance appears biased, or that is from sources that clearly have an agenda: while such information may help in assessing individuals, input from different staff can help identify and defuse attempts at manipulation;
- Reiterating the importance of the reliability and credibility assessments – of interviewees and information – conducted by the investigators;
- Ensuring investigators have as broad a range of contacts as possible, from as broad a range of actors and entities as possible;
- Reaching out to human rights non-governmental organizations (NGOs)/ human rights defenders (HRDs) with different backgrounds, geographical coverage and political loyalties (if relevant);
- Retrieving documentation that originates from all parties to a conflict; and from across various ranks/hierarchies within all governments concerned.



MINUSMA human rights officers gather information in the Menaka region of Mali.
UN Photo / Marco Dormino

(b) Perpetrator-targeted questioning

Investigation practice is generally to prioritize first-hand information.¹⁰⁷ A well-informed and well-prepared investigator – one with an in-depth understanding of the relevant events, organizational structures, individuals and elements that have been established and those that are outstanding – can secure valuable information from interviewees. In preparing for interviews, questions should be devised that aim not only at the *identity* of the person(s) believed responsible for the incident(s), but also all the other elements required to prove responsibility, such as – for international crimes – the mode of liability or *mens rea*. At a minimum, questions should cover:

For victims and witnesses to incidents:

- Whether the interviewee has information as to who (individual or unit) might have been involved; who might have ordered the attack/arrest/treatment. (Names or nicknames, etc.)
- Whether they can describe the individuals, including how many were involved.
 - Physical description (approximate age, height, hair colour, unique features, tattoos)
 - Ethnic group
 - Uniform (colour/design), if any, or dress/civilian clothes and any distinctive emblems or insignia
 - Rank(s), if identifiable
 - Types of vehicles, modes of transport (insignia, licence plates)
 - Types of weapons
 - Languages, dialects spoken, accents
 - Location (current or usual base/camp)
- Who seemed to take charge during the incident/attack? Were any instructions given? If so, by whom?
- Can they identify the leadership of the forces operating in their area?
- If the individual(s) used radios or phones to communicate, what did they say?

¹⁰⁷ There are multiple reasons for this, including the imperative of giving a voice to victims of violations and crimes. Other considerations are the ability to evaluate a source more effectively when they are being interviewed one-on-one, the limitations on time and resources confronting most CoIs, and the challenge of evaluating the often vast amounts of open-source material.

- How did the individual(s) control the area and control any victims during the incident?
- Are they aware of anyone who knows more about the incident/individuals, or of any other sources of information that might help the investigation?
- Can they identify the administrative, municipal, local council, judicial, police, or other authorities in their area?
- Has the witness heard anything that would reveal the underlying motivation of the individual, in particular if such motivation is based on ethnic, racial, gender or other discrimination relevant in international law?

For insiders/defectors from military forces, whether State or non-State:

- Can they describe their force's/unit's structure, organization charts and hierarchies?
 - Composition, design and purpose
 - Names (and *noms de guerre*) of individuals, both those in leadership positions and the rank and file
 - Types of weaponry and ammunition employed
 - Uniforms, insignia, other means of identification
 - Location of base or headquarters (with description)
 - Explanation of formal and informal command structures
 - Cooperation with or control over non-State groups in the area
- Can they explain the system of passing orders?
 - How formulated, what content
 - How circulated (written, oral, code, etc.)
 - Can they provide examples?
- Are they able to recall details of deployments?
 - Locations, dates
 - Operations conducted: types, numbers, equipment used
 - Others entities or individuals involved
- Did they ever witness (or take part in) conduct that they believed was of a criminal nature? (Security and rapport considerations permitting.)
- Can they describe policies, tactics or strategies that were in place, and how they were implemented?



United Nations peacekeepers patrolling on Lake Albert in the Democratic Republic of the Congo.
UN Photo / Martine Perret

- (For non-State actors) Were there links with State authorities, and if so, of what nature? For example, received support, intelligence, etc.
- Can they describe the internal discipline system, if any?
 - For what infractions (typically), what standards
 - How were they carried out, if ever
 - By whom
 - Describe any specific instances of internal discipline processes
- Do they know of any relevant documents/written orders/policies that are accessible (leaked, smuggled out, etc.)? If such documents are available to the investigator, can the insider/defector authenticate it?
- Were they ever ordered to make particular efforts to conceal potential violations or crimes?
- Can they describe the content of non-public speeches they heard the leaders give?
- Did anyone receive a promotion or an award for their role in a potentially criminal act or violation?

- Can they supply biodata for individual leaders?
 - Place and date of birth
 - Height; weight; hair, eye and skin colour, or other physical characteristics
 - Places and dates of education
 - Marital and family status
- Was there knowledge of, or training in, human rights or international humanitarian law standards?
- Was the motivation or ideology underlying the violations revealed in orders or pronouncements by other officials?
- Do they know of fellow insiders/defectors who are willing to speak?

Interviewing allegedly responsible individuals

- I. Those implicated in crimes and violations should be interviewed whenever possible:
 - as a source of first-hand information
 - for reasons of impartiality
 - to obtain the official version of events
 - to afford the “right of reply”
- II. The security of the interviewee and others (e.g., family members), as well as that of the investigator, should be paramount when deciding whether to undertake the interview.
- III. When interviewing someone who may be implicated in crimes or violations confidentiality should not be guaranteed. A typical scenario is when interviewing alleged perpetrators in order to obtain the official version of events. The investigation should retain the ability to share the information with an appropriate authority. Nor should the investigation protect a perpetrator at the expense of the truth about human rights violations.
- IV. It may also happen that a person implicated in violations or crimes offers information on the condition of confidentiality. The investigation must exercise caution here, in that it must assess the value of obtaining the information in light of factors such as the likelihood that future violations can be prevented – or more serious violations exposed – if confidentiality is assured. These are policy decisions that should involve the investigation’s leadership.

For HRDs and experts:

Investigative bodies generally seek out primary sources, i.e., those who saw or suffered an incident first-hand. While it may be that a given HRD is also a victim of or witness to specific violations – and if so should be interviewed as such, they can be key secondary sources, given their front-line position and close contact with the communities affected. HRDs may serve as intermediaries between the investigators and victims and witnesses. With regard to the practice of identifying individuals, they may be helpful with actor mapping, will probably be aware of the main events and crimes, and may have an analysis that assists the investigation in understanding the context and background – and thus the motivation – of various individuals or entities that might have committed violations. Investigators should also seek to understand the methodology the HRDs apply in their work.

Interviews with HRDs should focus on:

- Their knowledge of major events/incidents/attacks/treatment and who the victims or responsible parties may have been;



Thousands of civilians march on the 17th anniversary of the Santa Cruz massacre in Timor-Leste.
UN Photo / Martine Perret

- Their understanding of the parties involved, of their motivation, and of the hierarchies and structures, both civilian and military;
- Contact with victims and witnesses who may have information; and
- How they know the above information.

HRDs can be helpful in broadening the contacts and network base of investigators, but it is also important to assess aspects such as funding, political allegiance or linkage issues when determining the reliability of the individual and the credibility of the information provided.

Interviews with journalists (see “Professional media”, below) and others such as academics, experts, members of think tanks, parliamentarians, political commentators, etc. are normally context-specific, and depend largely on the person’s area of expertise, and therefore do not lend themselves to generalized question lists. On the other hand, such interviews are rarely undertaken without time for preparation. Investigators should look into the background of these sources, public statements or articles written by them, and what types of information and fields of knowledge they specialize in that might be of use to the investigation, as well as any connection they may have to any of the parties. A well-informed and well-prepared investigator can secure valuable information from such sources.

Annex IV contains a sample set of questions/instructions adapted from a Col that was mandated to identify responsible individuals.

(c) Publicly available information, open sources and social networks

Among the sources publicly available, a unique and often overlooked one is documentary information and publications from a State’s (or conflict party’s) armed forces and other government entities. The visible trend of such entities to use social media – at times to promote their own battlefield successes, at other times for fundraising, recruiting or propaganda – can provide a trove of material relevant to investigations. Yearbooks, rosters, promotional materials, websites and even death notices can help locate an individual within a security or military hierarchy. Such sources may also include the official results and publications of government or military investigations, claims of responsibility by specific groups, or indications of actual physical presence through media releases, official photographs, etc. They may show the structures, units and sub-units that can contribute to actor mapping. Equally, private social media accounts may show that particular individuals were in particular locations at a given time or interacted with relevant individuals, or they may provide information on the attitudes of the account holder that may be relevant,

for example, to discriminatory intent. All such information must be corroborated to the same standards as other information, but the extent to which it emanates from official (State) publications, which are normally separate from the hostilities themselves, may add credibility.

It is equally important to recall that false and deliberately misleading information is also rife on the internet. Parties to an armed conflict, and those that may support them, are known to view cyberspace as an extension of the battlefield. They may put into circulation photos, videos and narratives that are incomplete, altered, or designed to mislead. While authenticating the source of such information can prove difficult and may sometimes be impossible, it is incumbent upon the investigation to explore countervailing narratives and otherwise to test the credibility of the information and the reliability of the source. Different measures must be taken, such as finding other sources of the information or tracing it back to the original source and interviewing that person. Some investigative bodies have sought out (digital) forensic expertise.¹⁰⁸ The fact that such information is found on the web says nothing, in and of itself, about its value.

(d) Professional media

Journalists and media outlets can also be valuable sources of information on individuals who may have committed violations. Like HRDs, they are frequently close to the communities they report on and can provide analysis of context and circumstances. Depending on their “beat” they may also have knowledge of organizational structures, hierarchies and the backgrounds of those wielding authority.

Investigators should be cautious when interacting with media. Not only is there a risk that a journalist will report about the meeting, but the questions posed by investigators may divulge the focus of an investigation. It may not be prudent to allow journalists to draw conclusions as to the persons of interest. Staff should also not assume the journalists’ reporting will be independent.

Special consideration should be given to journalists who have been embedded with security forces under investigation. They may have excellent, first-hand information that was collected with a degree of professional observation. The fact of their close relationship to the party with whom they were embedded, however, could compromise

¹⁰⁸ Col Syria and the Sri Lanka investigation sought assistance from a forensic institute to ascertain the authenticity of a collection of photographs and videos that had come into their possession.

their impartiality. They may also have a motive for leading the investigation in a particular direction.

3. Tasking within the investigation

Depending on the internal division of labour, it is possible that any or all members of the team will play some role in the identification of responsible individuals. Especially early on, during the collection and analysis of information, it is common for everyone on the team to help complete the tasks, while for reasons of confidentiality only certain people may be involved in creating the final products (e.g., confidential dossiers). Depending on the time and resources available, the minimum tasks associated with identifying responsible individuals include:

- Drafting those elements of the investigation plan focusing on the identification of individuals, including specific guidance for investigators on how to meet the objectives outlined;
- Ensuring that an effective plan is in place and that it moves forward according to the timelines envisaged, or that timelines are adjusted to the exigencies;
- Generating a map of the actors within the armed forces or relevant civilian structures of each party to a conflict, or within the government, including with reliability/credibility assessments;
- Seeking out and interviewing key witnesses, including defectors and insiders;
- For investigations in the context of armed conflict or a highly militarized regime, ensuring an understanding of the ranks and roles of military, police, intelligence and militia/irregular forces personnel, as well as weaponry, deployment, logistics and similar. It is advisable to have a military specialist either on staff or accessible; other expertise should be brought in as required by the context;¹⁰⁹
- Quality control: ensuring that, while conducting interviews, investigators are asking questions that elicit the information necessary to address each element of the violation or crime, that they follow up on any additional information required for analysis, and that they record all information in a timely manner;

¹⁰⁹ For example, in the Eritrea Col expertise on the liberation struggle and the continuation of leadership structures was necessary; the Democratic People's Republic of Korea investigation required expertise on the organization of a socialist, one-party State.

- Seeking out relevant information on electronic media and social networking sites;
- Generating assessments and then identifying those individuals for whom the evidence meets the threshold (i.e., making the determination) by verifying that all elements of the crime or violation alleged have met the standard of proof.

Summary of key guidance

- Investigative bodies may attribute responsibility to *individuals* for crimes or violations arising under the three main branches of international law applicable in most contexts: international human rights law, international humanitarian law and international criminal law;
- Individuals can be identified as “responsible” for violations and crimes, whether in the criminal legal sense in or the administrative, civil, moral or political sense;
- For international human rights law findings, the individual identified must have been in a position to invoke the State’s responsibility under international law (i.e., must be a State agent); while for de facto authorities and NSAs, the individual must be similarly situated;
- Even in the absence of explicit language in an applicable international human rights law treaty, the conduct of superiors and accomplices who may be indirectly involved can and should be captured by the investigation;
- Investigative bodies should be transparent about the standard of proof adopted (generally, “reasonable grounds”) and employ it consistently;
- When applying the standard of proof to crimes or violations, before making a finding staff must ensure that each element reaches the threshold;
- For investigations involving armed conflict, the investigative body should have specialists on staff with extensive knowledge of security force and armed group structures, hierarchies, weaponry and strategies;
- Early in their mandate, investigative bodies should adopt a tool that facilitates the creation of maps or organization charts of potentially responsible individuals; they should populate it over the course of the investigation; and

they should identify at least one person on staff who will be responsible for the map, ensuring it is regularly updated with incoming information;¹¹⁰

- Investigative planning should include methods and strategies aimed at capturing a range of perpetrators;
- Where time and resources allow, investigation planning should contain strategies for securing *linkage* information and – for international crimes – securing information on *mens rea* and modes of liability;
- Where possible, specific questions should be prepared for each interviewee; investigators may be provided with a pre-prepared set of questions to ensure that perpetrator information is appropriately secured during interviews; and
- The personal security of interviewees is never more important than when the topic concerns specific individuals and their responsibility for crimes and violations. Staff must pay maximum attention to witness protection, consent, and information security protocols.¹¹¹

¹¹⁰ See section on “Mapping Actors and Institutions” in chapter on “Investigation Planning”, OHCHR *Human Rights Investigations Manual* (forthcoming); see also annex 2, “Sample tools to help map structures and individuals”. Certainly others can contribute to the map in various ways, and it may not be the only task of the designated individual, but one person should ensure, and be responsible for ensuring, that all the information collected is properly recorded.

¹¹¹ Further information on these topics is available in the following publications: OHCHR *Manual on Human Rights Monitoring*, chapter 14, “Protection of Victims, Witnesses and other Cooperating Persons” and chapter 15, “Gender”, in particular stage 3, “Actor Mapping”; UNDP’s *Gender Approaches in Conflict and Post-Conflict Situations*, October 2002; and OHCHR’s *Gender e-Tool/online course*.

Principle 10: Guarantees for victims and witnesses testifying on their behalf

“Effective measures shall be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission.

“(a) Victims and witnesses testifying on their behalf may be called upon to testify before the commission only on a strictly voluntary basis;

“(b) Social workers and/or mental health-care practitioners should be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault;

“(c) All expenses incurred by those giving testimony shall be borne by the State;

“(d) Information that might identify a witness who provided testimony pursuant to a promise of confidentiality must be protected from disclosure.

“Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.”¹¹²

¹¹² Impunity Principles, principle 10.



HOW TO GET THE MOST FROM THE INFORMATION

Information collected during an investigation and not included in public reporting is generally to be kept confidential. As noted, sharing information about individuals who are allegedly responsible for crimes or violations can affect core human rights, such as those concerning privacy and the presumption of innocence. Another limit on sharing is that information collected during a United Nations investigation belongs to the United Nations, and may be disclosed only in conformity with United Nations protocols, including those applicable to sensitive and classified information.¹¹³

Those limitations notwithstanding, this guidance presumes that information collected on responsible individuals is to be put to the best use(s) possible.¹¹⁴ The following text sets out the approaches taken to information sharing, including when responding to requests for information from external entities, and considerations for investigations seeking proactively to place pertinent information in the hands of entities that can use it to advance accountability.

A. Preliminary considerations

For the reasons set out above, investigative bodies must proceed carefully if considering disclosure. Both the positive and negative ramifications for released information are potentially serious and far-reaching:

- [For the victims, witnesses and sources](#) whose accounts contributed to the identification:
 - They may eventually see that justice is being done, or at least moving forward;
 - They, or their family members or associates, may also be the subject of reprisals or otherwise have their lives or security at risk;
 - Victims, witnesses and sources can themselves, potentially, be implicated in crimes or violations;
- [For the alleged perpetrators](#), identified by the investigative body:
 - They may face legal consequences, such as being arrested and tried;
 - They may also be ostracized, or face purges, torture or even extra-judicial execution, depending on their circumstances – even if innocent of the accusation;

¹¹³ Applicable rules include the Secretary-General's bulletins on record-keeping and the management of United Nations archives (ST/SGB/2007/5), and on information sensitivity, classification and handling (ST/SGB/2007/6).

¹¹⁴ See section 2 B, *supra*, where a number of potential uses of perpetrator information are described.

- [For accountability mechanisms:](#)
 - Findings may impact future judicial proceedings, including criminal prosecutions;
 - Public perceptions of responsibility that flow from findings vis-à-vis certain individuals will be translated into expectations of criminal liability or other types of accountability;
- [For the United Nations](#), and its human rights investigations:
 - In the case of investigative bodies with continuing or renewed mandates, there may be repercussions for the physical security of investigators and other personnel in the field;
 - The broader relations of the United Nations with institutions and groups led by persons identified as allegedly involved personally in violations may be affected; and
 - Reputational risks or limitations on access to particular interlocutors may result if confidentiality protocols are not honoured or data is mishandled or misreported.



Navi Pillay (right) and Chérif Bassiouni during the Human Rights Council's interactive dialogue on the report of the International Commission of Inquiry for Libya. UN Photo / Jean-Marc Ferré

B. Who decides?

Decisions on sharing information collected by independent United Nations investigations are taken by the investigative body. Thus, for example, the members of a CoI would decide whether and what information can be shared externally, within the bounds of the mandate and based on applicable United Nations rules and Standard Operating Procedures.¹¹⁵ Once the investigation ends, those decisions are taken by the custodian of the materials, usually OHCHR.¹¹⁶

OHCHR also makes decisions on sharing information with respect to investigations undertaken by OHCHR itself, including its field offices.¹¹⁷

C. Approaches to the disposal of information

Approach 1: Safeguarding the information – post-investigation legacy

The information collected is stored safely and securely according to UN archiving protocols.

In line with general United Nations policy, information collected or generated during an investigation, unless included in public reporting, remains safeguarded within the investigation and is ultimately archived. This applies to all raw information in any database(s), all interview notes, all physical materials, and any “actor maps”, “lists” or “dossiers” that may be part of those materials.¹¹⁸ When an independent investigation ends, the material is handed over to the custodian – usually OHCHR, as noted. Independent investigations often provide recommendations on its use, for example:

- That the information, including dossiers on alleged perpetrators, be updated and used by a specific office or field-based structure;

¹¹⁵ The Secretary-General’s bulletins and SOPs address the handling of sensitive information, including what can and cannot be made externally available and when; see Secretary-General’s bulletins on record-keeping and the management of United Nations archives (ST/SGB/2007/5), and on information sensitivity, classification and handling (ST/SGB/2007/6).

¹¹⁶ Ibid. OHCHR safeguards the information for United Nations purposes, in line with the rules on the handling of sensitive information and on archiving.

¹¹⁷ Applicable rules refer to the individual who is “authorized” to disclose such information, e.g., see ST/SGB/2007/6 (section 2.2) (“[T]he designation ‘confidential’ shall apply to information or material whose unauthorized disclosure ...”).

¹¹⁸ While the description here is limited to information about responsible individuals, many of the same considerations apply to other types of collected information.

- That OHCHR, as custodian, release the information to requesting entities that meet certain conditions, or who are deemed to be using it for specific purposes.¹¹⁹

Updated Principles to combat impunity

“The terms of reference of commissions of inquiry should highlight the importance of preserving the commission’s archives. At the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.”

Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, United Nations doc. E/CN.4/2005/102/Add.1, recommended by Commission on Human Rights resolution 2005/81, 21 April 2005.

Any recommendation should recall the custodian’s obligation to respect the consent choices made by the sources of the information and to ensure that proper security assessments are undertaken prior to any release of information.¹²⁰

Once OHCHR sends the materials for archiving, the information will be declassified and thus available to the public, although only according to United Nations rules.¹²¹ Thus, materials labelled “confidential” will be automatically declassified after 20 years, while those labelled “strictly confidential” will be reviewed on an item-by-item basis for possible declassification after the same period.¹²² This is why sensitive investigation materials such as interview notes, dossiers and any other materials that could reveal sources or alleged perpetrators should always be labelled “strictly confidential”.

¹¹⁹ While such recommendations could also be transmitted via a covering memo, when materials are transferred to the custodian at the end of the mandate, including them in the report serves the interests of transparency and securing them for posterity.

¹²⁰ See OHCHR *Manual on Human Rights Monitoring*, chapter 14, “Protection of Victims, Witnesses and other Cooperating Persons”. The custodian is to respect the sensitivity classifications attached to such materials as well as the “informed consent” that was recorded during interviews. See Secretary-General’s bulletin on information sensitivity, classification and handling (ST/SGB/2007/6), para. 1.2 (a) and (g).

¹²¹ Ibid. para. 4.3. See also Secretary-General’s bulletins on record-keeping and the management of United Nations archives (ST/SGB/2007/5).

¹²² Ibid.

Example 1: Central African Republic 2014

“In compliance with resolution 2127, the Commission has drawn up an annex which consists of the names of a significant number of individuals whom it has reason to believe should be the subject of criminal investigations, along with a statement of the crimes of which each is suspected, and an outline of the evidence against them that has been obtained by the Commission. This annex, along with accompanying evidence and other relevant materials, will remain confidential and will be submitted to the Secretary-General of the United Nations.”¹²³

Example 2: Darfur 2005

“The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor [the Prosecutor of the International Criminal Court, according to the Commission’s recommendations], who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.”¹²⁴

When other types of investigations close, such as those undertaken by the human rights components of United Nations peace operations, OHCHR field offices and similar, information on responsible individuals is managed according to the applicable UN procedures.¹²⁵

¹²³ S/2014/928, para. 24.

¹²⁴ S/2005/60, para. 645.

¹²⁵ See Secretary-General’s bulletins on record-keeping and the management of United Nations archives (ST/SGB/2007/5), and on information sensitivity, classification and handling (ST/SGB/2007/6).

Approach 2: Confidential sharing during the investigation

While the investigation is ongoing certain information or materials might be shared under specific circumstances and with selected recipients only.

Recognizing the restrictions on releasing United Nations information collected during an investigation, an investigative body might consider sharing certain information with selected **external entities**.¹²⁶ The three primary types of information that investigations usually possess and might share, i.e., (a) **open source**, (b) **that received via interviews or from third parties**, and (c) **the investigative body's own findings and conclusions**, are taken up in turn below:

(a) **Open-source information** can be shared without restriction, save for any security concerns that may arise.

(b) **Material or information received from sources**

An investigative body, or the custodian of the materials once the investigation closes, may decide to cooperate with external entities by providing information on allegedly responsible individuals that it has received in the course of the investigation – for example, notes revealing the content of an interview.

To share information received, investigative bodies should:

- (a) check whether the source has **consented** to the information being shared, and if so, with whom, and whether the consent was for personal identifying data (PID), narrative information, or both;¹²⁷
- (b) if consent was given, check whether any **protection concerns** would result for the source, or anyone else, and if so, whether sufficient mitigating measures, such as redacting portions of the text, can be implemented.¹²⁸

¹²⁶ For the purposes of this Guidance Note, external entities are those **outside the investigative body** itself. While sharing standards differ within and among the various United Nations entities, any entity that is not directly involved in the investigation, or making decisions as to responsibility, is considered external. For example, section 2 B, *supra*, refers to several that might receive information, including United Nations entities, all of which are by this definition external.

¹²⁷ Clarity on the consent provided is important. If the scope of the consent is not clear, the source might be approached again, where feasible. Where doubt cannot be resolved, the “do no harm” principle would normally weigh against sharing.

¹²⁸ See OHCHR *Manual on Human Rights Monitoring*, chapter 11, “Interviewing”, pp. 15-16.

The source information could be shared externally, confidentially, assuming both considerations are adequately taken into account (see Table 1 below). The investigation must also take into account the need to *redact* shared materials, not just for source-identifying information, but also for confidential work product that may appear in interview records (notes, clarifications, internal queries), as well as names of investigators, translators, intermediaries, and other sensitive information.

(c) *The investigation's findings and conclusions*

Sharing information that came directly from a source is usually preferable to sharing the investigative body's findings, as the latter on its own has limited value to a recipient. Still, an investigative body may choose to cooperate with external entities by providing its findings, whether *factual* findings or *conclusions* as to responsibility. For example, the investigative body may consider sharing its findings with another United Nations entity that is conducting a Human Rights Due Diligence Policy risk assessment, or with a national court that has requested them for a judicial process, or it may proactively offer them to a national vetting process.¹²⁹

Before sharing, the investigative body must:

- (a) determine whether the finding or conclusion has passed the standard of proof adopted, such as *reasonable grounds to believe*; and
- (b) check whether any person would be put at risk by the sharing.¹³⁰

For example, an investigative body may have collected sufficient information from multiple sources to find that a certain person was the commander of a detention centre, a *factual* finding. Or it may have concluded that the commander *was responsible for* crimes or violations that took place in the centre, a quasi-legal conclusion.

In this example, if no person would be put at risk by the sharing, or any such risk could be adequately mitigated, the investigation could share with an external entity the name of the commander as well as the investigation's finding that the person was in charge of the detention centre, or the conclusion that the person was responsible for crimes or violations that took place there.¹³¹

¹²⁹ See section 2 B, *supra*.

¹³⁰ A source might be put in danger, for example, if only a small number of people could know that piece of information. "Consent to share" from interviewees should not be at issue because the interviewee's information, whether narrative or identifying, is not being shared; instead it is the investigative body's own finding that is shared.

¹³¹ An investigative body prepared to share the name of the individual externally, along with a finding that the person was responsible for crimes or violations, should be confident that the "reasonable grounds" threshold has been met, and may consider whether a higher threshold is appropriate.

Example 1: Democratic People’s Republic of Korea 2013

“All information gathered by the commission, including information pertaining to individual perpetrators, has been stored in a confidential electronic database. The commission has authorized OHCHR, acting as the residual secretariat of the commission, to provide access to the existing materials contained in the database to competent authorities that carry out credible investigations for purposes of ensuring accountability for crimes and other violations committed, establishing the truth about violations committed or implementing United Nations-mandated targeted sanctions against particular individuals or institutions. Access must only be granted to the extent that witnesses or other providers of information have given their informed consent and any protection and operational concerns are duly addressed.”¹³²

Example 2: Syria Col

In its ninth report the Syria Commission stated that it was prepared to share information on a confidential basis, adopting the following approach:

“106. To further promote accountability, the Commission has shared information – where the consent of the interviewee was obtained – with the justice systems of States willing to exercise their national jurisdiction over crimes committed in the Syrian Arab Republic. As foreign fighters return home from battlefields in the country, there has been an increase in requests from these States over the past six months.

“107. Some States have also indicated a willingness to assert universal jurisdiction to pursue criminal investigations against suspected perpetrators, including foreign nationals, in the armed conflict. In the event that a State were to gain custody over such perpetrators and their national courts were to meet international fair trial standards, the Commission would be willing to share its information upon request.”¹³³

¹³² A/HRC/25/63, July 2014, para. 23 (emphasis added).

¹³³ A/HRC/28/69, paras. 106 and 107.



Members of the Commission of Inquiry on the Syrian Arab Republic speak to the press about their findings. UN Photo / Jean-Marc Ferré

In a press conference on 3 September 2015, the Syria Col commissioners elaborated their criteria for sharing perpetrator information:

“[Our] 4,000 plus interviews – that’s the source of possible cooperation, with investigations, prosecutions in various countries, that comply with various safeguards ... that cooperation is conditional, subject to various criteria:

- 1. There should be a request from a prosecutorial or judicial arm of a certain country;*
- 2. There should be an investigation from that country in regard to alleged crimes, on the basis of national jurisdiction and/or universal jurisdiction pertaining to particular acts happening outside their country, taking up the case;*
- 3. There should be [in place adequate] safeguards in terms of human rights guarantees and fair trial [guarantees];*
- 4. [The Col] will also look at the consent factors as to whether the victim or witness providing the information has consented to information sharing.*

The benefits of this approach are that the information collected by the investigative body is actually being used to further justice initiatives. As the information is not released publicly, the core human rights concerns of the person identified are alleviated to a significant degree. Nor is the “right of reply” from principle 9 of the *Impunity Principles* invoked,¹³⁴ although nothing prohibits the investigative body from upholding such a right, and certainly *where feasible* it should do so. This would also be in conformity with the principle of impartiality.

Importantly, the Syria Col reaffirmed that the consent of the persons providing the information should be obtained in advance. Under applicable source protection procedures, staff involved in the investigation, and later OHCHR personnel, must also consider, irrespective of the consent provided, whether sharing could compromise the security of the source.¹³⁵

Assessing the recipient¹³⁶

The Syria Col limited sharing to **judicial mechanisms**, excluding entities such as truth commissions or other United Nations agencies.¹³⁷ Each investigative body will make its own decision in this regard but, when assessing the suitability of a recipient, it should consider the following, non-exhaustive criteria:

- The purposes for which the information will be used are consistent with those of the United Nations and the mandate of the investigative body;
- The recipient has given assurances that confidentiality can and will be maintained; staff reasonably believe that those assurances can and will be respected;
- The recipient maintains adequate security protocols for handling sensitive information, including labelling, custody, storage and retrieval;

¹³⁴ See *infra*, note 142 (Impunity Principles).

¹³⁵ OHCHR *Manual on Human Rights Monitoring*, chapter 14, “Protection of Victims, Witnesses and other Cooperating Persons”, p. 8 (“Do No Harm”), and section 5 B 2, *supra*.

¹³⁶ The Syria Col, like any investigative body contemplating whether to share perpetrator information, had to make an assessment of the ability of the requesting entity – in this case a national court – to handle the confidential information appropriately. The Col was in a unique position in that its mandate had been repeatedly renewed, giving it time to consider and respond to requests for information. Other investigative bodies may not be in such position.

¹³⁷ As noted in section 2 B, information on individuals may be useful for, *inter alia*, truth commissions, assessments under the Human Rights Due Diligence Policy, the Policy on Human Rights Screening of United Nations Personnel, and/or national vetting processes.

- Where the recipient is a State, it maintains adequate civilian oversight of security institutions;
- Any attempts to retaliate against victims, witnesses or perpetrators have received an appropriate response from authorities in the recipient's jurisdiction;
- If the purpose can lead to a sanction or other negative consequence for an individual, the recipient guarantees appropriate procedural fairness, commensurate with the seriousness of the sanction/consequence, in rendering its decisions;
- For judicial systems:
 - Indicia of independence;
 - Lack of indicia of discrimination;
 - Broad respect for fair trial standards;
 - Enforcement of decisions, including contempt;
 - Proper appellate review;
 - Existence of a witness protection programme; and
 - Absence of the death penalty.

When deciding whether to share information confidentially with any entity, the investigative body should assess the totality of the circumstances. Even after such an assessment it is important to recall that, once information has been shared, the investigative body or, subsequently, OHCHR, loses control of it and can no longer ensure confidentiality.¹³⁸

¹³⁸ Sharing within the United Nations, where recipients would be subject to SOPs on the handling of such information, may pose less risk, but does not alleviate it altogether.

Approach 3: Identifying individuals in public reports

All or selected parts of the information on allegedly responsible individuals is set out in the report submitted to the mandating body or otherwise published.

“In most cases, the Commission has withheld the names of individuals believed to bear responsibility for violations. This is partly to prevent reprisals and partly to avoid prejudicing future fair trials.” – Libya Col (A/HRC/19/68), para. 14.

Identifying particular individuals as responsible in a public report

In the text of the report itself, practice generally is to include the information known on each incident investigated, together with information that identifies the party or entity implicated. It is not generally the practice to set out the names of *individuals*, as the factors that weigh against public revelation noted in this guidance are substantial.¹³⁹

Perhaps the most important consideration flows from the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*:

“Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees:

“(a) The commission must try to corroborate information implicating individuals before they are named publicly;

“(b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.”¹⁴⁰

¹³⁹ Since 2000, only three commissions of inquiry have included names of allegedly responsible individuals in their public reporting: Timor-Leste (2006), Report of 2 October 2006, paras. 113-133; Guinea (2009), Guinea Report (S/2009/693), para. 215; and Myanmar (2018), Report of the independent international fact-finding mission on Myanmar (A/HRC/39/64), para. 92. In these instances, unique circumstances attest to the exceptional nature of the public release. For Timor-Leste it was a particular quasi-international legal process that was in place, while for Guinea it was the ability to interview all alleged perpetrators. For Myanmar, the names published were already in the public domain and it was decided that their inclusion in the report would have a deterrent effect on ongoing violations. Most Cols refer publicly only to the party or entity implicated, or for example to “government security forces”. See, for example, Sri Lanka Report (A/HRC/30/CRP.2), para. 213. Note that this report also referred to responsible entities in more detail when it had the information, for example in paras. 64 and 227.

¹⁴⁰ Impunity Principles, principle 9 (emphasis added). For an example, see Guinea Col, *supra* note 89, where the interviews of individuals alleged to be responsible were included in the report. The full citation is at note 51.

While point (a) above should be undertaken as a matter of course in any investigation, point (b) presents a challenge. It is unlikely that the investigative body will have been in contact with, or will be able to contact, the individual identified, either because their location or address is unknown, or because the person, especially if fighting for a non-State armed group, is purposely keeping their location secret or may not want to be contacted. Publicly stating that the investigative body seeks to afford the person a “right of reply” is tantamount to identifying him or her in the first place. An alternative is to share the report with the government concerned prior to publication, when appropriate circumstances exist.¹⁴¹ If the investigative body was unable to afford the individual(s) an opportunity to respond, then in accordance with Principle 9, and human rights principles generally, their name(s) should not appear in a public report.¹⁴²

Other considerations weigh against public revelation. For example, where the possibility exists that criminal trials will follow a United Nations-mandated investigation, public pronouncements on responsibility may impinge on fundamental rights such as the presumption of innocence and due process.¹⁴³ Trials undertaken in a post-conflict environment are often politically charged and highly scrutinized. Speculation will be rife on any verdict that runs counter to the publicly released conclusions of a United Nations-mandated investigation, albeit one operating to a lower standard of proof. Moreover, investigative bodies are generally unable to provide a forum in which named individuals can defend themselves against the accusation. Concerns may arise for the safety of named individuals, with the possibility of reprisals against them.

Furthermore, refraining from publicly identifying individuals, while leaving open the option of sharing their names confidentially, might actually increase the deterrent effect. This is because actual perpetrators are left wondering whether they have already been identified or can still escape identification by changing their behaviour

¹⁴¹ This alternative would not generally assist in reaching individuals who are part of NSAs. In remote areas in particular, seeking comment from alleged perpetrators could have serious implications for the security of the sources, the victims and those who undertook the investigation.

¹⁴² Difficulties in communicating with alleged perpetrators might be overcome in a number of ways. For example, where State actors are concerned, the Col could write to the government and ask them to obtain the response from the individual. Non-State actors whose location is unknown might be approached through intermediaries. Another option is for the investigative body to note in the report that individual perpetrators have been asked to respond, through their government or intermediaries, and that the Col or OHCHR pledges to publish any response after the publication of the report, as an annex to the report on their website.

¹⁴³ See also Human Rights Committee, general comment No. 32, para. 30. Portrayals of guilt in State media have been found by the HRC to constitute a violation, see Communication No. 1397/2005, *Engo v. Cameroon*, Views adopted by the Human Rights Committee on 22 July 2009, para. 7.6. The ruling indicates that the publication in the media of the names of implicated individuals has human rights implications.



A United Nations human rights team in Bogoro, Democratic Republic of the Congo, investigates crimes committed against civilians. Pictured here is a witness showing the skull of an alleged victim.

UN Photo / Martine Perret

from this point forward. Conversely, an individual publicly identified might consider that she/he has nothing more to lose.

These factors notwithstanding, in very **exceptional circumstances**, and subject to the possibility to afford individuals an opportunity to provide their version of the events,¹⁴⁴ an investigative body might opt to reveal names publicly if it finds one or more of the following considerations particularly compelling:

General

- The interests of transparency, as full information is shared with everyone, not just a select few;
- Public revelation may have a greater deterrent effect, and/or may serve to marginalize, politically or otherwise, those identified as responsible;

¹⁴⁴ If the name of the individual is already in the public domain or the person has already been convicted of conduct similar to that found during the investigation, then this issue is clearly less relevant.

- Revelation strengthens the findings overall by demonstrating the specificity that the investigation has achieved;
- The revelation can feed directly into truth seeking or other accountability mechanisms, such as vetting or sanctions (see above, section 2 B, “To what end?”);

Context-specific

- The mandating body may have wanted individuals to be identified and publicly named;
- The names may already be in the public domain;
- The individual may have since died;
- The evidence against the individual may be so strong as to remove any doubt as to their responsibility;¹⁴⁵
- There may be no other foreseeable possibility of accountability for the alleged perpetrators, making the report the most authoritative account on responsibility for the violations and crimes;
- The individual may already have been charged or convicted of conduct relating to that found during the investigation;¹⁴⁶ or
- The alleged perpetrator may be in a prominent leadership position such as head of State or prime minister; or may be implicated by being the sole person representing an institution or entity identified as responsible for violations.¹⁴⁷

In these circumstances issues concerning security, due process and the presumption of innocence decrease, although they do not disappear.

¹⁴⁵ For example, see the “Report of the UNJHRO on serious human rights violations committed by members of the Congolese defence and security forces in Kinshasa in the Democratic Republic of the Congo between 26 November and 25 December 2011”, para. 33 (named commander was in the public domain), http://www.ohchr.org/Documents/Countries/CD/ReportDRC_26Nov_25Dec2011_en.pdf.

¹⁴⁶ See for example “Final report of the FFMs of the UNJHRO into the mass rapes and other human rights violations committed by a coalition of armed groups along the Kibua-Mpofi axis in Walikale territory, North Kivu, from 30 July to 2 August 2010”, para. 44 (available at http://www.ohchr.org/Documents/Countries/CD/BCNUDHRapportViolsMassifsKibuaMpofi_en.pdf) (named individuals were indicted). See also DRC Mapping Report, para. 104 (“However, the identities of perpetrators under warrant of arrest and those already sentenced for crimes listed in the report have been disclosed.”).

¹⁴⁷ For example when the Eritrea and Democratic People’s Republic of Korea Cols identified “the President” and “the Supreme Leader”, respectively.

“The two fundamental principles of the protection of sources of information from possible harm and the need to respect the right to fair trial of individuals who are alleged to have committed violations need to guide the approach of commissions/missions on this issue.” – OHCHR Guidance and Practice, p. 14 (citing the Updated Set of Principles ...)

If the identified individual(s) took up the opportunity to respond, their perspective on the incident would also be included, thus diminishing in part certain key human rights concerns.¹⁴⁸

If publicly naming individual perpetrators in the report, the investigative body must also specify the relevant acts or omissions. Merely publishing a list of names can cause confusion, resulting more in resentment than illumination.

Example 1: Darfur (2005)

“The decision to keep confidential the names of the persons who may be suspected to be responsible for international crimes in Darfur is based on three main grounds. First, it would be contrary to elementary principles of due process or fair trial to make the names of these individuals public. In this connection, it bears emphasizing Article 14 of the ICCPR and Article 55 (2) of the ICC Statute, which concern the rights of persons under investigation and which may be reasonably held to codify customary international law. These rights include the right to be informed that there are grounds to believe that the person has committed a crime, the right to remain silent and to have legal assistance. The publication of the names would [deny] the possible perpetrators the fundamental rights that any suspect must enjoy.”¹⁴⁹

¹⁴⁸ If the individual(s) were given the opportunity but chose not to respond, then some human rights concerns would be addressed, but others would remain. An example would be the opportunity to examine information proffered or to confront witnesses. Again, these protections attach to criminal proceedings and are to be guaranteed by the State. United Nations-mandated investigations are not bound in the same way, but should endeavour to respect such rights to the extent feasible.

¹⁴⁹ S/2005/60, para. 526.

Example 2: Democratic People's Republic of Korea (2014)

The mandate of the Democratic People's Republic of Korea Col did not require it to identify alleged perpetrators. The Commission nevertheless wrote a letter to the Democratic People's Republic of Korea Supreme Leader sharing with him the findings contained in its final report. The Commission drew the Supreme Leader's attention to the principles of command and superior responsibility under international criminal law and urged him to prevent and suppress the alleged crimes and violations. The Col sought as well that alleged perpetrators be prosecuted.¹⁵⁰

Alternatives within public revelation

Certain alternatives have been employed that allow the public provision of information on implicated individuals.



A demonstrator beaten by police while commemorating an apartheid-era massacre in Cape Town, South Africa. UN Photo

¹⁵⁰ A/HRC/25/63, annex I.

- *Role only*

Some investigative bodies have opted to describe the **role** of the alleged perpetrator, but without revealing their name. For example, a Col might report publicly that “the head of X militia” or “the president of Y political party” is deemed responsible for certain crimes or violations.¹⁵¹ In these cases, interested parties such as the media or civil society may be able to fill in the blanks. This approach carries with it many of the due process and security risks that attach to public revelation, and in many cases is tantamount thereto.

- *Institutional affiliation only*

A second, more suitable practice is where the investigative body sets out in the report its *conclusions* as to **specific units/institutions** responsible for violations and crimes, but without naming any individual. Elsewhere, the report includes *factual* findings concerning the **individuals who held leadership positions** in that unit/institution at the relevant point in time.¹⁵² This approach, while being less problematic in human rights terms, allows the identification of the State or party responsible, and of the particular structure within that State/party, while separately it identifies an individual or individuals who may or may not be responsible depending on their conduct within the institution.¹⁵³ To be clear: there is no direct allegation of individual responsibility in the report,¹⁵⁴ and hence there is also no responsibility to afford a right of reply to the individual(s) in question.

Guidance for public revelation

- If publicly releasing conclusions on the responsibility of *individuals*,
 - the “reasonable grounds” threshold must clearly be met,¹⁵⁵ and
 - individuals must have been afforded the possibility to provide their version of the events;

¹⁵¹ For example, see Libya Report (A/HRC/19/68), para. 188, with respect to Revolutionary Guard leadership, or para. 566, with respect to the leadership of the Popular Guard; in both instances the Col replaced the name with a number.

¹⁵² See for example the OHCHR Sri Lanka (OISL) Full Report (A/HRC/30/CRP.2), paras. 104-170, detailing the organizational structures with the names of the leadership. Then see paras. 262, 274, 306 and 346 where the entity, in this case the military intelligence, is implicated in violations and crimes.

¹⁵³ The size of a given unit within a military structure can vary widely, and Cols can choose to be as specific as their information allows in making the identification, for example by going further into sub-units.

¹⁵⁴ Further investigation would be required to “connect the dots” in terms of responsibility, as the individual might not have had “effective control” over the elements who committed the violations, or may have unsuccessfully tried everything in his or her power to suppress the violations.

¹⁵⁵ As noted, this standard is a minimum: the investigative body might consider setting a higher threshold for public revelation.

- Factual findings concerning an individual (such as a position held) may be included in a public report, irrespective of whether a right to reply was afforded, but *without* indicating *responsibility* for any crime or violation;
- Individuals should not be named as responsible, or allegedly responsible, without being connected to a specific incident or incidents for which the investigative body has concluded that a crime or violation occurred.

Example on reporting publicly

*A fact-finding mission (FFM) concludes that summary executions of captured enemy fighters took place and that a specific person, whose name is known to the FFM, was the head of a militia group implicated in the incident. However, the leadership of the group changed over time, and information conflicted as to whether this specific person was in fact the head, and in effective control of the militia, at the time of the executions. At the end of the investigation, the FFM has “reasonable grounds to believe” that the person was the leader and in effective control at the relevant times.*¹⁵⁶

In this example, the fact of executions taking place would be a violation or a crime that is reportable under the “reasonable grounds” standard. Under that same standard, the FFM might also name the militia as responsible. The FFM *might* also name the leader of the militia group, but as a finding of fact. The FFM could share, under the “reasonable grounds” standard, the factual finding of dates on which the person was the head of the militia. However, the FFM should not publicly describe the leader as *responsible* for the executions unless, at a minimum, a right of reply has been afforded.

¹⁵⁶ This situation could easily arise, for example if witnesses cannot recall precise dates, or if the FFM secured evidence of executions taking place both before and after the person was head of the militia, but not during that period.

Table 1

Guidance for Reporting and Sharing Information on Individuals					
Type of information	Info received from source(s) (e.g., interview, photo)		Investigation's <i>factual</i> findings & conclusions on institutional responsibility	Investigation's conclusions on individual responsibility	Open-source information
Consent & security risks	No consent to use or share , or risk to security of source(s) or others is unmitigable	Have consent to use or share, & any risk to security of source(s) or others is mitigable	Have consent to use , & any risk to security of source(s) or others is mitigable	Have consent to use , & any risk to security of source(s) or others is mitigable	Consent is inapplicable , & any risk to security of source(s) or others is mitigable
Standard of proof	N/A		Reasonable grounds to believe	Reasonable grounds to believe ¹⁵⁸	N/A
Sharing & reporting	<i>Information is not reportable publicly nor shareable</i>	<i>Information is reportable publicly & shareable, consistent with consent</i>	<i>Information is reportable publicly & shareable</i>	<i>Information is reportable publicly only exceptionally & is shareable confidentially</i>	<i>Information is reportable publicly if source cited & is shareable</i>
Treatment of Source	Source may not be revealed	Source may be revealed only if consent included PID ¹⁵⁹	Source may not be revealed ¹⁶⁰	Source may not be revealed ¹⁶¹	Cited

¹⁵⁷ This threshold should be considered a strict minimum for sharing conclusions as to individual responsibility.

¹⁵⁸ Personal identifying data.

¹⁵⁹ The information reported or shared must not contain anything that could identify the source(s). Note that in some instances the revelation of a source might occur inadvertently, if only a limited number of people could have known the information shared or reported.

¹⁶⁰ Ibid.



An investigator from the Commission of Inquiry on Burundi prepares for interviews in a church near a refugee camp in the DRC. UN / OHCHR Photo / Uta Simon

Summary of key guidance

- If sharing *findings* or *conclusions* externally, the investigative body should apply its adopted standard of proof.
- In all cases of information sharing:
 - The decision to share is to be taken by the investigative body itself, within the bounds of the mandate and applicable UN rules;
 - The risk that sharing poses to the security of the source(s), witnesses, perpetrators, interpreters, victims, staff, interlocutors, etc., must be carefully weighed;
 - The information shared must be redacted so that no source-identifying information is included in the absence of informed consent; nor are any confidential work product, internal notes, names of staff (e.g., HROs, interpreters), names of third parties (e.g., interlocutors), etc., or any superfluous information included.

- If a request seeks information that points to the source, the information may be shared only when:
 - Informed consent to share has been secured; and
 - There is no reason to believe that the source’s personal security would be at risk.¹⁶¹
- Open-source information can be shared at any time, assuming no threats to security.

Example: Sharing information

Based on two open sources and information from three interviewees, an investigation determines that it has “reasonable grounds to believe” that person X is responsible for having taken a number of people hostage. Two of the interviewees refuse to consent to the external sharing of their information. The investigative body is then approached by a credible, independent national court for information. The court provides assurances that the information will be kept confidential.

If the request is for generic information, the investigation may consider declining. If, however, the investigative body determines it is prudent to cooperate with the court, it may consider sharing:

- (a) *Open-source information*: such as information in a government’s or civil society organization’s public report;
- (b) *Sensitive/confidential information*: information received from sources in confidence, but only where consent to share with such a court has been given and no security risks preclude sharing;
- (c) *Facts or factual findings*: such as facts about the hostage taking, for example the number of hostages; or *conclusions*: its own determination that person X bears responsibility for the crime.

(See Table 1 above.) All five sources may be used to reach the conclusion that is eventually shared under (c), but the sources themselves would not be revealed. The investigative body must ascertain, however, whether sharing the name of X could

¹⁶¹ See OHCHR *Manual on Human Rights Monitoring*, chapter 14, “Protection of Victims, Witnesses and other Cooperating Persons”.

put any of the sources in danger (security assessment) or enable their identification (confidentiality). The name of X should not be shared, however, if the quantity of information on hand does not cross the “reasonable grounds to believe” threshold. The investigative body could also share its understanding of the facts as reasonably believed, again without revealing sources. It should avoid providing facts that are in essence conclusions as to responsibility.¹⁶²

Also shareable is the information from the one interviewee who gave consent (b), as well as the two open sources (a).¹⁶³

¹⁶² Compare “Person X was seen at the location” (fact) versus “Person X is the primary hostage taker” (conclusion).

¹⁶³ Clearly the “do no harm” principle would preclude sharing even this information if there are concerns for the security of sources that could not be mitigated.



DOSSIERS ON RESPONSIBLE INDIVIDUALS

A. From lists to dossiers

Many recent investigative bodies have created “lists” of individuals believed to be responsible for violations and crimes.¹⁶⁴ Nevertheless, practice has been moving away from lists in the strict sense, as investigative bodies seek to provide as full a picture as possible of the implicated individuals. A more effective approach is to produce something akin to a “dossier”, the aim being a product that might eventually be shared confidentially, after consideration of all the factors set out in this guidance. It is strongly recommended that investigative bodies generate shareable dossiers before the close of the investigation.

1. Dossiers

Dossiers differ from a mere list of individuals as the former include, at a minimum, the information on hand with respect to identified individuals, as well as summaries of each incident in which she or he is believed to be implicated.¹⁶⁵ Dossiers should exclude information allowing the identification of victims, witnesses and other sources, although they should still contain coded links allowing the investigative body or the custodian to identify the requisite sources. Where time and resources permit, dossiers may include information about the individual’s professional history, rank, role(s), statements made, physical characteristics, biodata, family ties, and so on (see “Information to include”, below).

At the end of the investigation the dossiers must be labelled, appropriately classified, and preserved in the investigation’s archives.

¹⁶⁴ Between 2005 and 2017, eight Cols created files on individual perpetrators which were handed over to OHCHR, either as “confidential lists” for the Secretary-General’s or High Commissioner’s safekeeping, or together with the other materials/dossiers in a database that identified individuals: Darfur (2005), Democratic Republic of the Congo Mapping (2010), Libya (2011), Côte d’Ivoire (2011), Syria (multiple), Central African Republic (2014), Democratic People’s Republic of Korea (2014) and Sri Lanka (2015) (10 cases). See *Guidance and Practice*, section II, “Mandates”, pp. 13-14. Note that nearly all the investigations named entities or units in their public reports; this count includes only the Cols that recorded the names of implicated individuals.

¹⁶⁵ Information from the “actor map” (see section 3 C 1 (b), *supra*) should be included in the dossier.

Example: Democratic Republic of the Congo (DRC) Mapping Report (2009)

“All the relevant information relating to the **782 open incidents and cases** can be found in the Mapping Exercise database, which was submitted to the United Nations High Commissioner for Human Rights in Geneva. The following entries can be found in the database for each incident or case: the source(s) of the original information, fiche(s) d’entretien with witnesses to the incident, the nature of the violations committed, a description of the violations and their location in time and space, preliminary classification of crimes revealed by the incident, the approximate number of victims, the armed group(s) involved and the identities of some of the victims and the alleged perpetrators.”¹⁶⁶

Creating dossiers is time- and resource-intensive. The resources expended in generating them must be weighed against the anticipated benefit, noting that the benefits may last well beyond the life of the investigative body.

2. Information to include

As noted, a simple list of names is of little value to a genuine pursuit of accountability. Practice among investigations to date has varied concerning the level of detail included in dossiers: “the more, the better” is true so long as guidelines are respected. The information should be sufficient to alert the recipient to the scope and nature of the crime or violation and the source material that the investigative body retained on the implicated individual. Dossiers must be properly organized and follow a simple, clear structure.

¹⁶⁶ DRC Mapping Report, para. 119.

The database or data collection tool(s) should permit staff to record the following, as a minimum, on each individual:

Name Rank

Biodata¹⁶⁷ Unit Affiliation

Area of operation/responsibility

Other relevant information (see annex IV)

Crime/Violation/Incident 1 (summary)¹⁶⁸

Source 1

Source 2

Source 3

Mode of liability

Assessment of standard of proof

Crime/Violation/Incident 2 (summary)

Source 1

Source 2

Source 3

Mode of liability

Assessment of standard of proof

¹⁶⁷ For example, age, date of birth, height, weight, sex, physical description, health status, tattoos, unique characteristics. See annex IV for a more thorough list of data points that may be collected.

¹⁶⁸ In some databases this can be done via a link to the “Incident”, which should include a summary. The summaries should not contain confidential information.

The **Name** field should include all relevant names, including that of the father, or other means used culturally to identify the person.¹⁶⁹ **Biodata**, including any unique physical descriptors, is an often-overlooked information category. It can be important later in distinguishing individuals of the same or similar names. Securing a picture of the individual is also useful.

The **Unit Name** and **Affiliation** headings refer to the party, State, or organizational unit to which the person belonged at the time of the incident. If that changed over time, the table should be adjusted to reflect this.

Crime/Violation/Incidents will be those in which the person is implicated, set out in *summary* form. The dossier should include as many different incidents as appropriate. Investigative bodies may refer by cross-reference to the incidents or findings in the report, or via a reference number to incidents established in the database. For top leadership, where the number of specific incidents is less important, more general references to responsibility may be included.

The **Source** would be only the coded interview number or, if an open source, might include the weblink or a short description. **Modes of liability** for crimes and **Standards of proof** are discussed above.

Other than the named individual, no names or other identifying information concerning the sources, United Nations personnel, interpreters, other parties or witnesses, etc., are included in the dossier, even if a source has given consent to share. Summaries should be checked and any such information redacted. Dossiers should be prepared on the understanding that the information inside is shareable confidentially. Instructions accompanying the dossier should include the investigative body's assessment of any protection concerns and relevant mitigation measures germane to sharing the dossier externally.

If, after reviewing the dossier, the recipient requests to view the source material (e.g., interview notes) or to meet the source, the investigative body must refer to the consent provisions, conduct a security risk assessment, and respond accordingly. Particular caution must be exercised for some incidents, such as instances of sexual violence, where the victims or witnesses may be known or are few in number.

The dossier templates can be made as sophisticated as needed, and should be more so when the investigation is operating during a conflict or in situations that

¹⁶⁹ Noms de guerre may also be used in the absence of the given/family name. All known names and nicknames should be recorded.

evolve or take place over extended periods. The same individuals may be involved in multiple incidents in multiple locations; they may also change roles, ranks and organizational units. Databases and most spreadsheets allow for expansion as more information is gathered. Bespoke software is also available for this purpose.

Reliability and credibility ratings are generally not included in the *final* version of the dossier; rather, the standard of proof that was reached for that individual/incident should be indicated. During the actor mapping or initial generation of the dossiers, however, it is helpful to have this rating information to hand.

Example: Information to include in a dossier

The following information could be included in a database used to generate a dossier:

- 1. Three separate interviews from victims alleging they had been tortured in a detention facility. One had a “high” credibility and reliability ranking, while the other two had “medium”. The one with high ratings could not name the commander, while both with medium ratings did so.*
- 2. A newspaper story concerning a fire at the detention facility included a statement made by the commander of that facility. In the statement the commander discussed matters such as the number and status of the inmates housed in the facility.*
- 3. A local human rights NGO report, based on 20 interviews, alleged torture in the facility, and named the commander as the alleged perpetrator. However, in a photograph featured in the report, the commander’s face did not match that published in the newspaper story, nor was the person’s rank consistent with other information on hand.*
- 4. A page on the website of the ministry of the interior covering the promotion ceremony for certain (police or military) leaders, listed their names and ranks. The alleged commander was among those listed.*
- 5. A defector said he had served in the detention facility and witnessed torture, but had not himself been involved. He did not divulge the names of any colleagues or commanders, but provided the rank of the commander of the facility. It matched the rank that the investigative body had on hand.*

In this example, the various pieces should be safeguarded in the database, whether by hyperlink,¹⁷⁰ interview number, or attachment.

¹⁷⁰ Best practice entails making a copy of the webpage rather than storing only the link, in case the webpage is later removed.

3. Sequencing and timing

The final assessment of information on alleged perpetrators is to be made after the investigation closes but – for time-bound investigations – before the end of the mandate. This narrow window can prove challenging in light of the myriad demands placed on staff as an investigation winds down – constraints that have led different investigative bodies to begin generating dossiers at different times.

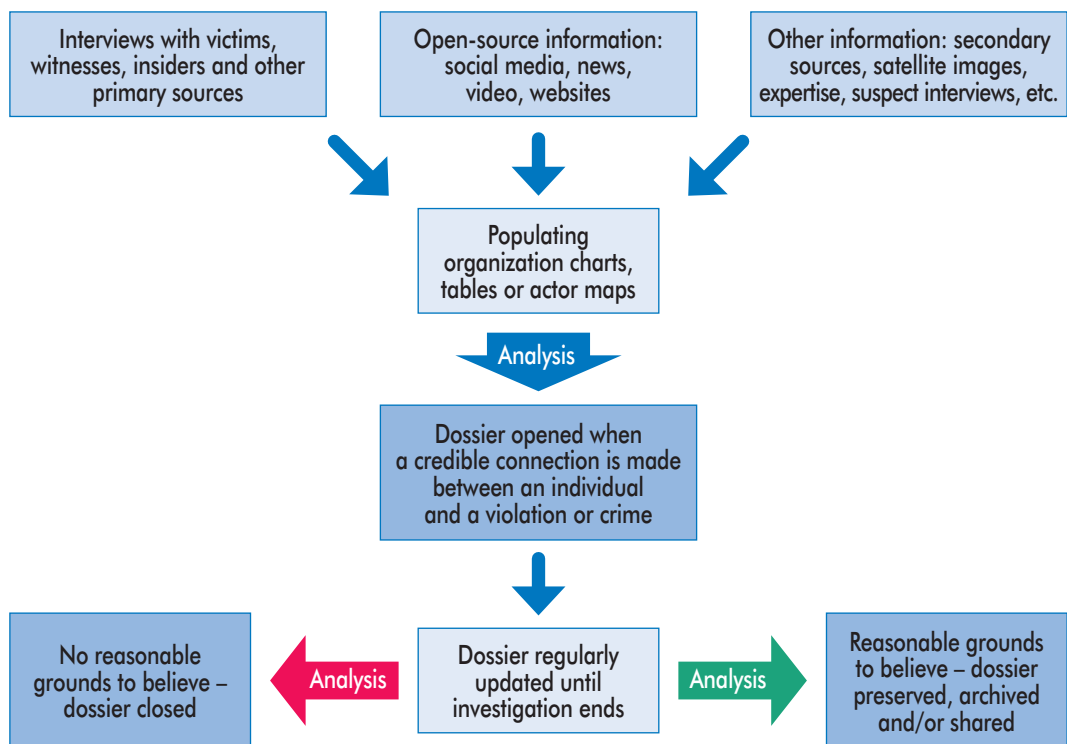
(a) Simultaneous

Most investigative bodies use the same investigative process for identifying individuals as for identifying the underlying violations and crimes. When a violation or crime is identified, a dossier is opened on all those implicated. The advantage of this approach is the consistency between the findings of the report and the information in the dossiers. It obviates the need to review the same material on two occasions and to make two judgments. As additional information surfaces in the course of the investigation, or if the mandate is renewed (Cols), the dossiers may be updated. To facilitate this, the database should be configured to allow new source information to be cross-linked to the suspected individuals.

(b) Subsequent

Other investigative bodies populate dossiers only after the report has been completed. The advantage is that this prioritizes the report and other products which have earlier delivery deadlines: dossiers have no fixed deadline so long as they are completed by the end of mandate (time-bound investigations) or the close of the office/mission (field presences). A consequence of this approach, however, is that insufficient time and attention may be devoted to analysing the evidence on suspected individuals. Contracts may be ending and staff departing, leading to a risk that the dossiers may be rushed. Waiting until the end may also give rise to inconsistencies if a subsequent and separate review of the information, perhaps by different people, leads to different conclusions with respect to key elements, or if new or different information has surfaced in the meantime.

It is strongly recommended that dossiers be generated simultaneously with the identification of the crime or violation.



B. Dossiers once generated

1. Relationship between the dossiers and the report

For methodological and transparency purposes, investigative bodies should refer in their report to the manner in which they approached individual identification. Where individuals are identified, either confidentially or, in exceptional cases, in the public version, the report should clearly indicate the standard of proof and how it was employed. Where confidential dossiers are created, the report should state where they will be kept and recommend under what circumstances they may be opened or used. The report may also indicate where the remaining materials, both physical and electronic, will be kept.¹⁷¹ If a dossier is later shared, a record must be kept of the request, the response, and details of all information shared.

¹⁷¹ As noted (see *supra*, notes 118 and 121), the materials are handed over to the High Commissioner for safekeeping until the point at which United Nations archiving rules apply. Recommendations in the public report complement, but do not replace, a handover note to the High Commissioner which may include more technical (or protection-sensitive) details that should not feature in the public report.

Example 1: Côte d'Ivoire

*"In the light of the information that it has gathered, the Commission concludes that there are reasonable grounds for presuming, in relation to the post-electoral events, the individual criminal responsibility of certain persons whose names appear on **the confidential list annexed to this report**, which may be transmitted to the competent authorities for the purposes of a judicial investigation."¹⁷²*

Example 2: Democratic People's Republic of Korea

*"Where testimony or other information received by the Commission indicated the names of individuals who committed, ordered, solicited or aided and abetted crimes against humanity, these have been duly recorded. This was also done where the Commission could ascertain the names of individuals who headed particular departments, prison camps or institutions implicated in crimes against humanity. **Relevant information has been safeguarded in the Commission's confidential database.** The Commission has authorized the OHCHR, acting as the residual Secretariat of the Commission, to provide access to such information to competent authorities that carry out credible investigations for the purposes of ensuring accountability for crimes and other violations committed, establishing the truth about violations committed or implementing United Nations-mandated targeted sanctions against particular individuals or institutions. The Commission has requested the HC to grant access only to the extent that witnesses or other sources of information concerned have given their informed consent and that any protection and operational concerns are duly addressed."¹⁷³*

¹⁷² A/HRC/17/48 & 49, 2011, para. 118 (emphasis added).

¹⁷³ A/HCR/25/CRP.1, 2014, para. 1196 (emphasis added).

2. Public information

The more transparent the investigation is, the more confidence the public will have in the content of its reports. Even when dossiers will remain confidential, it is important to explain publicly the methodology followed in generating them, the standards of proof employed, the types of information collected and included in the dossier (e.g., name, rank, incident, role), and similar. When a dossier is to remain confidential it is not advisable to reveal its “meta-content”, such as the number of individuals identified or, for example in the context of an armed conflict, the percentage of perpetrators from each of the parties.

Summary of key guidance

- Rather than lists of names, generate **dossiers** on individuals that contain as complete a profile as possible and that represent the conclusions as to the individual’s responsibility for crime or violations;
- Inside dossiers, use codes (e.g. interview numbers) to link the information therein with sensitive source materials stored elsewhere;
- When sharing conclusions as to responsibility, adhere strictly to the standard of proof: “reasonable grounds to believe” is a minimum threshold;
- Indicate clearly in the dossier whether the individual’s conduct has crossed the “reasonable grounds to believe” threshold with respect to each incident;
- Be clear in the report that any identification of responsible individuals is not an allegation of guilt in the criminal sense and that the investigative body is not a judicial body and does not avail itself of judicial or police powers;
- While maximizing the use of the information gathered, remain strictly within the confines of the **informed consent** provided, do not compromise the promise of confidentiality made to the source, and strictly respect the “do no harm” principle;
- Recall that, once the information leaves its possession, the investigative body can no longer guarantee **confidentiality**.¹⁷⁴ source protection must remain paramount;

¹⁷⁴ With the possible exception of sharing within the United Nations, where the recipients would be subject to United Nations protocols on handling sensitive information.

- Save in exceptional circumstances, do not publish a name together with an allegation of responsibility unless the named individual has been afforded the opportunity to respond;
- Where feasible, identify implicated individuals and build the dossiers **simultaneously** with the analysis of the violations and crimes that are to be reported publicly;
- Be clear as to the role of the individual, whether directly responsible, involved in planning or soliciting, or in a leadership/superior position with “command responsibility”;
- Prepare dossiers in the expectation that their contents may be shared confidentially with selected recipients. When a dossier or some portion thereof is shared, a record must be kept of the request, the response, and details of the information shared;
- Include sufficient information to associate the named individual with the violations and crimes for which they are alleged to be responsible. However, no sensitive information – such as that which could identify a source – may be included in the shared materials;
- At the close of the mandate of independent bodies, be aware that OHCHR takes custody of the dossiers and related materials, and safeguards them in line with United Nations policy;¹⁷⁵
- Set out in the report, or in materials handed over to OHCHR, as appropriate, any departures from standard methodology or other unique features of the collection, identification or determinations relating to individual responsibility;
- When information on identified individuals is to be kept confidential, do not divulge the number identified nor the percentage of such of individuals in the different parties to a conflict. Other information concerning the content, such as the type of information included and the methodology followed, should be divulged;
- To ensure the guidance survives over time, consider making recommendations in the report itself on how to use the materials collected; the recommendations should be principle-based rather than detailed, given that they cannot account

¹⁷⁵ For OHCHR field presences, the dossiers remain within OHCHR.

for every eventuality and that the custodian will be required to exercise some level of discretion;¹⁷⁶

- Label as “Strictly Confidential” all interviews containing information on implicated individuals; and
- At the end of the investigation, and once the materials have been handed over, remove all perpetrator-related information from computers and hard drives.

¹⁷⁶ Consider also repeating the recommendations in any covering documentation sent directly to the custodian along with materials.



CONCLUDING CONSIDERATIONS

Identifying individuals who are responsible for crimes and violations is a core task of United Nations investigations. When undertaken with respect for the presumption of innocence it represents an important opportunity to advance accountability. In the absence of a compelling reason not to do so, all investigative bodies should collect and safeguard information that can help with identification. The fact that such information exists means that those in a position to take appropriate action may actually be able to do so. This final section sets out some of those actions.

Recommendations relating to those identified

Most investigations conclude with recommendations, some of which relate to accountability and to individuals believed to bear responsibility. Referral for criminal prosecution is one of the most frequent, along with a reminder to States of their international obligations in this respect. Other recommendations of a non-judicial nature might also be considered vis-à-vis implicated individuals. Examples of such recommendations include:

- (a) Prohibit identified individuals from working in the public sector, including the intelligence or security services;¹⁷⁷
- (b) Feed relevant information into the United Nations Human Rights Due Diligence Policy framework, to preclude support from United Nations agencies to implicated security structures/units;
- (c) Provide information on identified individuals for the screening of United Nations personnel, to preclude service in United Nations entities;
- (d) Where appropriate, recommend that identified individuals be the subject of United Nations mandated, targeted sanctions, so long as rigorous procedural safeguards that guarantee minimum standards of due process are in place;
- (e) Institute disciplinary or administrative measures, including demotion or the prohibition of promotion for those identified;
- (f) Feed information into vetting processes that may be underway or envisaged;

¹⁷⁷ Impunity Principles, principle 36, Reform of State Institutions, para. a.

- (g) Prohibit such individuals from joining private security firms or owning or carrying weapons;
- (h) Ensure the possibility of judicial processes with respect to civil liability; and
- (i) Ensure that the individuals responsible are made to pay reparations.¹⁷⁸

Like other aspects of individual identification, recommendations on accountability measures should be fully in line with human rights norms and standards.

¹⁷⁸ General Assembly resolution 60/147 (2005), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 15 (“In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim, or compensate the State ...”).



ANNEXES

ANNEX I

Excerpts from an investigation plan – the portion focusing on the identification of alleged perpetrators

TERMS OF REFERENCE (MANDATE)

Bearing in mind that the resolution urges the Col to conduct its work with a view to holding accountable those implicated in crimes and violations, the terms of reference respond to this request:

“... 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 ...”

The Col discharges this part of the mandate by preparing **confidential dossiers** that are handed over to the High Commissioner at the end of each mandate, for safe keeping. They include information about *individuals*, such as commanding officers and officials – at the highest levels of government and/or non-State armed groups – for which there are reasonable grounds to believe that they are implicated in gross human rights violations or violations of international humanitarian law or international criminal law.

As part of its investigations, when the evidentiary threshold is met the Col will continue to identify as many individuals as possible. New dossiers based on the Commission’s findings will be established in an electronic form, the information being drawn from groups and individuals identified during the investigation where there is sufficient corroboration to reach the “reasonable grounds to believe” threshold.

The Col will turn over its database of materials to OHCHR, including the dossiers of individuals, at the close of its mandate in March.

FOCUS OF INVESTIGATIONS

Identifying alleged perpetrators

The identification of individuals believed to be responsible is a priority, given its direct mention in the mandate. As the Col identifies violations, irrespective of the implicated party, it will endeavour in each instance to identify the perpetrator of the violation. It will pursue information at the level of party, entity and/or individual. The Commission will seek out information for crimes and violations that have been committed at any time within the temporal scope of the mandate.

The systematic torture, disappearances, starvation/deaths in custody that are alleged within government detention centres represent an investigative priority as the violation appears to be ongoing. The identity of some involved in such conduct is available. Investigators should seek out doctors from military hospitals, defectors from the military police and elsewhere, and ex-detainees from detention centres involved, in order to build a fuller picture of the crime base and to identify those responsible at the various levels of the hierarchies within the intelligence/detention apparatus. NSAs and opposition groups are also keeping detainees, and allegations of maltreatment are circulating. These should be pursued with equal vigour.

ALLEGED PERPETRATORS

Based on its previous findings the Col will continue to focus its investigations on the following individuals and institutions:

(1) Government officials and institutions

The Col seeks to verify information relating to individuals and units which, owing to insufficient corroboration, did not reach the thresholds. Special attention should be paid to senior officials, including those of civilian authorities, the army and security services. Defectors and other high-level insiders will be sought out together with other sources, including open sources.

State responsibility may also apply to the acts of foreign elements (see paragraph below) where those elements are acting on behalf of government forces.

(2) Militias and paramilitary groups

The Col has previously documented how pro-government militias were deployed at times alongside government forces, at other times in areas where government forces were not present. These groups were found to have perpetrated serious human rights violations on behalf of the government. The government sought to coalesce these irregular forces into a single unit (XX) for which it provides funding, training and oversight. The XX has also been implicated in crimes and violations. Militias and other pro-government groups continue to operate. The Col will continue to collect information on these entities.

The presence of foreign elements on the side of the government forces has been confirmed through the open acknowledgement of YY's participation, coupled with solid evidence of the presence of ZZ forces. Information collected on foreign nationals' involvement in crimes and violations will be collected and entered in the database of perpetrators, alongside those of BB nationality.



Protesters burn tyres during the 2017 presidential elections, in Migori, Kenya.
UN / OHCHR Photo

(3) Non-State armed groups

In addition to specific incidents, the Col will update its findings on Non-State Armed Groups including the CC and DD groups. In particular, investigations are to assess the level of organization of these groups regularly, bearing in mind that this is a key requirement for the application of international humanitarian law and also has a bearing on crimes against humanity findings.

ANNEX II

Sample tools to help map structures and individuals

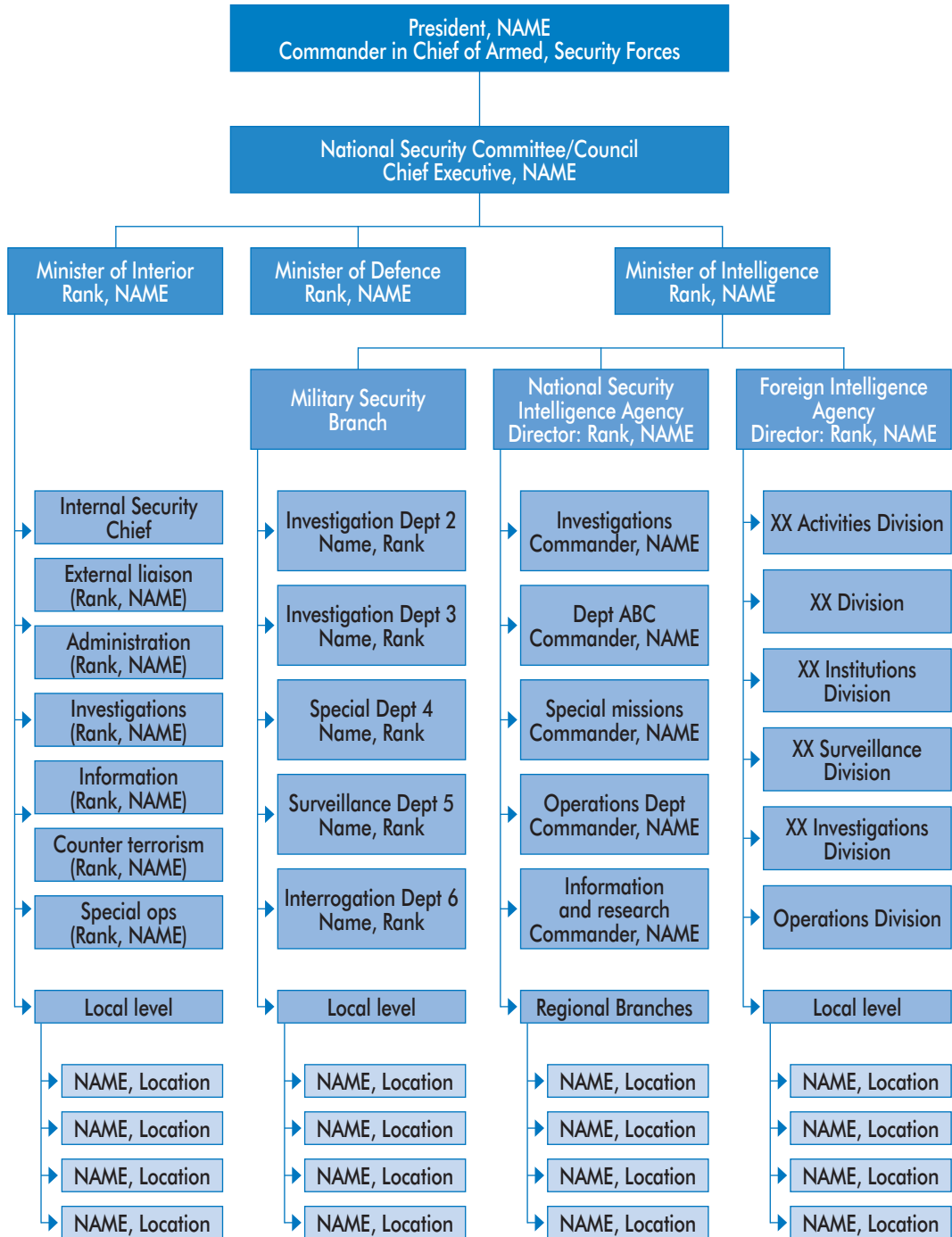
Special armed forces

Corp.	Division	Brigade	HQ location	AoRs/ deployed	Leader-ship	Source			Interview number
						Reliability rating	Rank category	Unit/ service	
Army									
Special Forces									
Air Force/ Air Defence									
Independent Units									
Missile Command									
Airports									
Border Guard									

Security services

Service	Branch	Location	Leadership	Source Reliability	Rank Category	Unit/Service	Interview Number
General Security							
Civilian Intelligence							
Military Intelligence							
Military Police							
Prisons							

Country X SECURITY APPARATUS



ANNEX III

Sample guidance for investigators when interviewing

Guidelines for interviews of and about alleged perpetrators (APs)

Investigators are requested to be aware of and to follow the recommendations below in order to support the process of identifying perpetrators and compiling dossiers. The list below is not exhaustive, and all investigators are kindly requested to share their concerns and suggestions for improvements.

1. General

- ▶ Interviews with military defectors and insiders constitute a primary source for AP identification. However, do not underestimate what a civilian – man or woman – could know about APs.
- ▶ Try as far as possible to collect multiple statements (two or more) on an AP's involvement in the same incident, in the same location, on the same dates or with the same unit/service/armed group.
- ▶ Be aware that such interviewees may be motivated to mislead the investigation and to blame others while downplaying their own actions. If you believe the person may be implicated in crimes or violations:
 - Be cautious about pursuing lines of inquiry that could indicate your suspicions.
 - Be aware that you may find yourself disliking the person for what they have done, especially if you are familiar with the victims, but as an investigator you are obliged to remain objective and not allow such feelings to colour the interview.
 - Ensure that you have covered the consent and confidentiality assurances strictly in line with policy, with due regard to the guidance below.

2. Consent and confidentiality

- ▶ If an interviewee is implicated in crimes or violations then confidentiality should not be guaranteed. We must retain the ability to share the information with an appropriate authority. Similarly, if the interviewee is a serving government official, they are generally deemed to be providing the “official version” of events and thus confidentiality should not be guaranteed, nor is it necessary to obtain consent to use or share the information.
- ▶ If the interviewee is implicated but seeks to implicate others and will do so only on the condition of confidentiality, then you should contact leadership. The same goes for any currently serving official who seeks an “off-the-record” meeting. If a discussion with HQ is impossible, exercise caution and your best judgement to assess the value of obtaining the information in light of factors such as the likelihood that a future violation can be prevented, or more serious violations exposed, if confidentiality is assured.
- ▶ Take care to duly note in the interview record any understandings or undertakings with regard to confidentiality. Take exceptional care with security risks.

3. Information on APs from pro-government forces

- ▶ Whenever interviewing a defector from armed forces, inquire about the unit up to division level and down to battalion level; for security services ask about the service, the branch, and the post. Ask about their structure, leadership, and headquarters and operations location. Do this even if there is no alleged violation. You will have to use your professional judgment as to the best way to get at this information considering the comfort level of the interviewee.
- ▶ When interviewing defectors, ask about their unit’s commanders and the commanders’ potential involvement in human rights violations, rather than their own involvement in (leading) military operations. Of course, rather than beginning the interview with such questions, it may be wise to ask first about “successful” or “unsuccessful” operations, and to bring up violations later.
- ▶ Collect as much information as possible on the AP named by the interviewee, including rank, full name, unit or service, and exact circumstances of the perpetrator’s involvement (location and date, etc.).

- ▶ When getting the name of the AP, try to get their first name, their father’s first name and their family name. Otherwise, try to get as many details as possible to identify him or her, such as city of origin, physical description, place of residence, previously held positions.
- ▶ Recall that we are seeking those reasonably believed to be involved in:
 - perpetrating violations themselves (direct perpetrator); or giving orders to others to commit crimes or violations; and
 - commanding units involved in violations and international crimes (command responsibility).
- ▶ Try and note down things that the interviewee told you were said by the AP – quotations. Especially helpful are statements that indicate knowledge of human rights or international humanitarian law violations, orders conveyed or received, disciplinary measures taken or not taken (and similar statements evincing “effective control” or lack thereof).
- ▶ Military and security officers may have been promoted, transferred or dismissed during the period under review. Whenever investigators meet new defectors/insiders, therefore, they should get the latest updates on the leadership of the army units and security services in which the interviewees served.
- ▶ If the investigator is not familiar with [*foreign language*] terminology and its equivalent English translation, it is preferable for ranks and unit levels to be written in their [*foreign language*] names but using the Latin alphabet. Ask the interpreters to provide the [*foreign language*] name as stated by the interviewee.

4. Information on APs from non-State actors (NSAs)

- ▶ Always ask about the involvement of NSA elements in human rights or international humanitarian law violations, including names, location and date of incident, name of groups and affiliation.
- ▶ Always attempt to learn about the NSA’s affiliation, whether local or to a broader organization/group. Bear in mind that groups may have similar-sounding, or even the same, names even though they operate in different areas. Always check, therefore, about the group’s area of activities and leadership.

- ▶ Seek out the name of the leader at the highest level possible. Recall that the investigation must show his or her “effective control” over the group. Questions to elicit this are, for example, “Were orders always followed?” “What if someone didn’t follow an order, what would happen?” “How were the orders passed on?” “Were there different ranks in the NSA – i.e., was it a hierarchy with multiple levels, or was there just one commander while everyone else was a ‘soldier’?” “Was the commander usually present?”

5. APs among civilian authorities

- ▶ Recall that we are also interested in the involvement of (civilian) political leaders in human rights and international humanitarian law violations. Please try to collect information on local authorities’ responsibility (governors, political party officials, community leaders).
- ▶ To prove their responsibility for crimes – where the civilian leader is not a direct perpetrator – collect information that shows the individual “*knew, or consciously disregarded information*” about the misdeeds of their subordinates. Quotations from such leaders that demonstrate such knowledge are especially helpful. Ask interviewees what sources of information the (civilian) leader normally relied on. Ask also the “effective control” questions relevant to military leaders, above.

ANNEX IV

Information to collect on allegedly responsible individuals

Databases or information management tools should be configured to permit the collection and storage of the following information on suspected individuals. For each item, the source should be recorded, and traceable. Not all of the information is necessary or relevant for every individual, nor will it be possible to collect it.

General

- Name (*noms de guerre*, nicknames, aliases)
- Month/day of birth, year of birth/age, age range
- Nationality, clan/tribe/ethnic group, place of birth
- Religion, political affiliation, clubs/associations/memberships/groups/gangs
- Passport or any identification number(s) (e.g., tax number)
- Family members: immediate and extended, including former members (deceased/divorced)
- Phone number, email address, social media handles, other contact information
- Current residence/address, duty station, where posted
- Language(s) spoken
- Financial situation, tax returns
- Existing criminal or disciplinary record

Biodata

- Height, sex, eye/hair/skin colour, physical description, body shape
- Health status, medical information (e.g., injuries, addictions, conditions)
- Other unique or notable physical characteristics (e.g., scars, tattoos, limp)

Professional/Military information

- *Military*: Rank *Civilian*: Profession or title
- Affiliation, entity (including NSA, where relevant), department, individuals above and below in hierarchy
- Professional history/career, including previous ranks/titles/positions (include NSA posts)
- Area(s) of operation/responsibility, including dates and any foreign deployments/posts
- Description of uniform(s), including insignia, medals, accessories (e.g., watch/jewellery)
- Public appearances/statements/speeches, written works/publications
- Indicia of “effective control” over subordinates, disciplinary measures carried out, orders given, strategies/policies/tactics deployed

Education/Training

- Primary/secondary, advanced/university education, technical/vocational/apprenticeships
- Certificates, courses, special skills
- International training and courses abroad, including with the United Nations or regional organizations

Responsibility

- Summaries of, or links to, the incidents in which the individual is implicated
- A description of the individual's role (mode of liability, where criminal)
- An assessment of how the information collected passed the evidentiary threshold, if not otherwise clear

Other information

For example, habits/routines, modus operandi, places frequented, "calling cards", reputation/notoriety, networks, type of transport used, associates/cadres (e.g., classmates from same year)

ANNEX V

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The Office of the United Nations High Commissioner for Human Rights (OHCHR) is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in international human rights law. It is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights and subsequent human rights instruments, the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining United Nations human rights work. In addition to its mandated responsibilities, it leads efforts to integrate a human rights approach within all work carried out by the United Nations system.

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