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The Future of Human Rights Fact-Finding

Philip Alston
An Emerging Fact-Finding Discipline?
A Conceptual Roadmap for Social Science Methods in Human Rights Advocacy

Forthcoming in THE FUTURE OF HUMAN RIGHTS FACT-FINDING

Margaret L. Satterthwaite
Justin C. Simeone

Human rights advocates seek to find, interpret, and communicate facts about rights violations amidst some of the most complex social, economic, and political circumstances. To meet these challenges, fact-finders have developed research procedures that increasingly draw on a wide range of interdisciplinary tools and perspectives—with a notable expansion in the use of qualitative and quantitative methods from social science during recent years. Yet there is little discussion of investigative principles, research components, and methodological standards in the human rights field—a reality that often fuels tension and uncertainty over the extent to which social scientific research standards can and should inform evolving fact-finding conventions. As a result, fundamental questions about such standards remain unaddressed. To fill this gap, this chapter offers three core contributions. First, this chapter contextualizes the discussion by presenting data concerning the methods and conventions used by researchers at Amnesty International and Human Rights Watch in the years 2000 and 2010. Second, this chapter interrogates the nature of social scientific inquiry and the degree of overlap between social science research and human rights fact-finding by comparing investigative principles, research components, and methodological standards. These comparisons reveal that social scientific research and human rights fact-finding share many common foundations and suggest that there is great potential for further convergence—especially in relation to methodological transparency. Third, drawing on some of the key distinctions between social science research and human rights fact-finding, this chapter highlights some of the methodological trade-offs that human rights investigators will likely confront when more directly considering social scientific strategies. This chapter ultimately cautions against the creation of a social science of human rights fact-finding, given the unique challenges and irreducible ethical commitments of human rights fact-finding. It instead calls for open and inclusive conversations about the most promising and appropriate standards for the evolving practice of human rights fact-finding.

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Human rights advocates seek to find, interpret, and communicate facts about rights violations amidst complex social, economic, and political circumstances. The pursuit of factual accuracy is intrinsic to human rights advocacy. ‘A human rights group should never lose a factual challenge,’ statistician Patrick Ball emphasizes. ‘Our moral legitimacy depends on speaking truth to power.’\(^1\) To meet this objective, human rights investigators increasingly supplement traditional testimonial strategies with social science methodologies, including quantitative data and tools.

Yet this trend has raised important questions and concerns about the relevance of seemingly abstract and technical social science methods, especially quantitative techniques. For example, Sally Merry worries that, when quantification enters the picture, ‘political struggles over what human rights … means and what constitutes compliance are submerged by technical questions of measurement, criteria, and data accessibility.’\(^2\) In assessing statistical tools, others raise alarm over the trend toward ‘quantification’\(^3\)—which threatens to replace traditional qualitative strategies with a new ‘technology of distance’\(^4\) or ‘cult of statistical significance.’\(^5\)

Unfortunately, in spite of debates over the potential risks associated with the turn toward certain quantitative tools, there exists only limited discussion of the underlying investigative principles, research components, and methodological standards for the evolving human rights fact-finding community.\(^6\) To fill this gap, this chapter poses a foundational question: as human rights investigators increasingly rely on social science concepts and tools, to what extent do—and can—they follow the same disciplinary standards that guide and constrain social science researchers using the same methods? Based on current fact-finding trends, we argue that there is significant potential for human rights investigators to adapt some standards from social science. At the same time, we delineate a conceptual roadmap for future discussions about the most appropriate standards for unique human rights fact-finding challenges.

To inform this process, this chapter unpacks the ‘logic of inference’ that underlies much of social science research, devoting significant attention to the ways in which this logic interacts with fact-finding objectives and challenges.\(^7\) It attempts to capture the core values, research

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components, and methodological standards that structure the ways social science researchers identify, describe, and evaluate real world observations, presenting them alongside similar processes in the human rights fact-finding realm. In doing so, this chapter conceptualizes ‘social science’ in a broad manner that includes anthropology, economics, psychology, political science, and sociology. Despite the immense array of epistemological perspectives among and within these disciplines, a wider perspective allows us to identify common—if not universal—conventions that span inductive and deductive as well as qualitative and quantitative traditions.\(^8\)

This discussion is presented for consideration by human rights fact-finders who work in advocacy settings. Advocacy-oriented fact-finding has developed alongside criminal justice-oriented investigations, which focus on providing evidence for national and international criminal courts. Since these fact-finders already adhere to specific investigatory rules and standards—and often have significantly different objectives—we do not focus on this strand of human rights investigation. Although there is certainly crossover from one realm to another, our discussion most closely relates to fact-finding for advocacy purposes. Specifically, we draw significantly on the work of fact-finders using data-driven advocacy techniques—an important and expanding subset of the community.\(^9\)

Ultimately, this chapter aims to add weight to work already underway in the human rights community that seeks to move fact-finding beyond its roots in persuasive advocacy methods to more fully inhabit the space of valid inferential methods in support of advocacy.\(^10\) It is not our aim to suggest that fact-finding should become a social science of its own. There are many ethical and practical reasons why this would be ill-advised. In a world of ‘evidence-based’ policy, however, we suggest that investigators will benefit from greater reflection on the most promising and appropriate conventions for the human rights community. Greater transparency and rigor will ultimately enhance credibility with target audiences.

The chapter proceeds as follows. First, it provides original data that captures key developments toward embracing core social science practices in human rights fact-finding. Second, it explores key points of divergence and convergence between social science research and human rights investigations. Third, the chapter identifies principles that derive from the scientific process that can complement human rights fact-finding. Fourth, it identifies fact-finding components that guide investigation scope, information collection, and analytical examination—whether fact-finders engage inductive or deductive reasoning. Fifth, it provides a general framework for understanding the relationship between investigative objectives and methodological decisions. Sixth, drawing on some of the core distinctions between social science research and human rights fact-finding, the chapter highlights certain trade-offs between methodological decisions. Finally, it concludes with a call for open and inclusive conversations about the most appropriate standards for the evolving human rights fact-finding community.

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\(^8\) This chapter does emphasize empirical approaches, which are more closely aligned with fact-finding efforts.

\(^9\) These investigators typically have some training in social science and/or partial interest in speaking to audiences with some training in social science. The Human Rights Data Analysis Group is one example.

1. Recent Fact-Finding Strategies

Human rights fact-finding has its roots in the legal and journalistic traditions. Yet investigations increasingly incorporate data and tools akin to those in social science. This section provides an overview of key features of typical human rights reports based on an original data set that analyzes Amnesty International (AI) and Human Rights Watch (HRW) reports from the years 2000 and 2010. Compared to earlier reports, our data shows that 2010 reports rely on more sources and include more quantitative information. Although the reports address methodological decisions with greater frequency, there remain opportunities for a more direct and robust discussion of fact-finding methodologies.

A. The Data Set and Methodology

The data set encompasses all AI and HRW fact-finding reports, from the years 2000 and 2010, that were available in English and posted on the organizations’ websites. Reports were included if they: (a) presented facts and/or analysis explicitly based on some form of primary research, either field or desk research; and (b) included specific recommendations related to the content of the report. Trained law students coded over 30 variables in each report; additionally, verification checks were performed for 10 percent of the reports. A random sample of 42 reports was subjected to in-depth qualitative coding using the software package Atlas.ti by a trained graduate student. All coding activities were supervised, and discrepancies were resolved, by Margaret Satterthwaite. Quantitative analysis was conducted by Justin Simeone.

B. Human Rights Reporting Trends

AI and HRW published 258 reports that fit the description above during the years 2000 and 2010 combined. This section describes core characteristics of these reports, including the rights examined and information sources cited. It also captures whether a given report discussed

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12 Many sources use the terms ‘tools’ and ‘methods’ interchangeably. This chapter deliberately distinguishes between these terms. Whereas ‘tool’ refers to specific device for analyzing information (e.g., text analysis), ‘method’ refers to the ‘rules of inference’ on which the validity of that analysis depends (e.g., inter-coder reliability). ‘Methodology’ refers to the study of the latter process. See King, Keohane, and Verba, supra note 8, at 9. Whereas most debates focus on the data and tools, this chapter call for a broader focus on methodology—within the context of the larger investigatory process.

13 Recommendations were required to ensure advocacy-oriented reports. Numerous exclusion criteria were applied to ensure the data set was composed of reports based on original fact-finding. The data does not include: (a) reports styled as submissions to UN bodies, regional organizations, or other international entities; (b) amicus briefs and other legal filings; (c) memoranda, checklists, and ‘backgrounders’; (d) legal or policy memoranda (i.e., documents that analyze legislation or policy without research into other sources); (e) summary ‘World’ or ‘Annual’ Reports; (f) books published by external publishing houses; (g) press releases, press backgrounders, or ‘extended pressers’; and (h) summary versions of other reports by the same organization.

14 After an initial round of quantitative coding, the codebook was extensively revised, condensed, and simplified. A new set of trained students conducted the coding for this chapter.
methodology, included a specific methodology section, and/or described methodological limitations. Although these categories do not encompass all issues relevant to fact-finding procedures and methodologies, they suggest the degree of attention to methodology given by two prominent organizations that have played a key role in establishing this report 'genre.'

Table 1: General Report Characteristics (Percent and Number)

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Physical Integrity</td>
<td>49.6</td>
<td>40.6</td>
<td>-9.0</td>
</tr>
<tr>
<td>Participation and Association</td>
<td>24.3</td>
<td>15.4</td>
<td>-8.9</td>
</tr>
<tr>
<td>Due Process and Rule of Law</td>
<td>49.6</td>
<td>48.3</td>
<td>-1.3</td>
</tr>
<tr>
<td>Rights in Armed Conflict and Humanitarian Law</td>
<td>33.9</td>
<td>13.3</td>
<td>-20.6</td>
</tr>
<tr>
<td>Social, Economic, and Cultural</td>
<td>6.1</td>
<td>28.0</td>
<td>+21.9</td>
</tr>
<tr>
<td>Gender Equality, Identity, and Sexuality</td>
<td>8.7</td>
<td>18.2</td>
<td>+9.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Research Characteristics</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Co-Authoring Organizations</td>
<td>2.6</td>
<td>6.3</td>
<td>+3.7</td>
</tr>
<tr>
<td>Multiple Country Focus (&gt; 1 Country)</td>
<td>13.0</td>
<td>11.9</td>
<td>-1.1</td>
</tr>
<tr>
<td>Field Research Component</td>
<td>64.3</td>
<td>88.1</td>
<td>+23.8</td>
</tr>
<tr>
<td>Secondary Source Citations</td>
<td>88.6</td>
<td>95.1</td>
<td>+6.5</td>
</tr>
<tr>
<td>Reports &gt; 15,000 Words</td>
<td>39.1</td>
<td>70.6</td>
<td>+31.5</td>
</tr>
<tr>
<td>Recommendations Comprising &gt; 10% of Total Report</td>
<td>22.3</td>
<td>6.3</td>
<td>-16.0</td>
</tr>
</tbody>
</table>

Table 1 indicates that reports focused on a growing number of human rights topics between 2000 and 2010. Mirroring broader trends, 2010 reports devoted greater attention to gender equality, gender identity, and sexuality as well as social, economic, and cultural rights. At the same time, these reports also grew lengthier. The average word count in 2010 reports was nearly 50 percent greater than the average word count in 2000 reports—increasing to an average of 23,717 words from an average of 15,709 words, respectively. The number of reports that explicitly relied on field research and cited to secondary sources also increased significantly. It is noteworthy that

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15 This includes reports that discussed methodology beyond a simple statement that traditional human rights methods of interviews and visiting sites were utilized. The word ‘methodology’ need not be used; instead, the report could discuss any of the following: (a) types of research approaches used (e.g., interviews); (b) selection procedures for interviewees; (c) kinds of desk research undertaken; and/or (d) methodological justifications.

16 This includes reports where methodology was presented under a stand-alone, formal section, whether labeled ‘methodology’, ‘methods’, ‘approach’, or similar.

17 This includes reports where limits are discussed alongside methodology (e.g., limited access to certain provinces).


19 New rights areas taken on by the organizations (e.g., social and economic rights) were not responsible for the greater average length of 2010 reports.

20 For comparative purposes, this chapter (including footnotes) contains approximately 15,000 words.

21 Field research refers to an original investigation conducted by the organization. Secondary research refers to existing research from other sources.
recommendation length did not increase proportionally, suggesting that additional content focused on evidentiary information, methodological concerns, and other analytical components.

Table 2: Report Information Sources (Percent and Number)

<table>
<thead>
<tr>
<th>Years</th>
<th>2000</th>
<th>2010</th>
<th>Diff.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>115</td>
<td>143</td>
<td>—</td>
</tr>
<tr>
<td>Testimonial Information</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interviews by the Organization</td>
<td>85.4 (n=76)</td>
<td>98.5 (n=129)</td>
<td>+13.1</td>
</tr>
<tr>
<td>Victims, Witnesses, and/or Survivors</td>
<td>78.4 (n=69)</td>
<td>98.4 (n=127)</td>
<td>+20.0</td>
</tr>
<tr>
<td>Government Officials</td>
<td>46.9 (n=38)</td>
<td>80.2 (n=93)</td>
<td>+33.3</td>
</tr>
<tr>
<td>Others (e.g., Experts)</td>
<td>48.8 (n=39)</td>
<td>89.3 (n=108)</td>
<td>+40.5</td>
</tr>
<tr>
<td>Focus Group Discussions</td>
<td>0.0 (n=0)</td>
<td>4.2 (n=6)</td>
<td>—</td>
</tr>
<tr>
<td>Primary Non-Testimonial Information</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surveys</td>
<td>0.0 (n=0)</td>
<td>3.5 (n=5)</td>
<td>+3.5</td>
</tr>
<tr>
<td>Primary Information (Original)</td>
<td>36.5 (n=42)</td>
<td>53.1 (n=76)</td>
<td>+16.6</td>
</tr>
<tr>
<td>Trial, Court, and Adjudication</td>
<td>12.2 (n=14)</td>
<td>7.7 (n=11)</td>
<td>-4.5</td>
</tr>
<tr>
<td>Forensic (e.g., Site Evaluations)</td>
<td>13.0 (n=15)</td>
<td>24.5 (n=35)</td>
<td>+11.5</td>
</tr>
<tr>
<td>GIS/Mapping Information</td>
<td>0.0 (n=0)</td>
<td>2.1 (n=3)</td>
<td>—</td>
</tr>
<tr>
<td>Secondary Non-Testimonial Information</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secondary Information (Non-Original)</td>
<td>87.0 (n=100)</td>
<td>95.8 (n=137)</td>
<td>+8.8</td>
</tr>
<tr>
<td>Health/Economic Indicators</td>
<td>16.5 (n=19.9)</td>
<td>36.4 (n=52)</td>
<td>+19.9</td>
</tr>
<tr>
<td>Criminal Justice (e.g., Prison Data)</td>
<td>73.9 (n=85)</td>
<td>72.0 (n=103)</td>
<td>-1.9</td>
</tr>
<tr>
<td>Demographic (e.g., Ethnic Data)</td>
<td>20.0 (n=23)</td>
<td>24.5 (n=35)</td>
<td>+4.5</td>
</tr>
</tbody>
</table>

Similarly, Table 2 demonstrates that AI and HRW reports increasingly relied on a broad range of primary and secondary information, both quantitative and qualitative. Along with a growth in explicit reliance on field research, more than 98 percent of 2010 reports included testimonial information explicitly drawn from interviews with victims, witnesses, government officials, and/or others. A small number drew information from focus group discussions. Yet many 2010 reports also included information from additional primary and secondary non-testimonial sources,²² including forensic (25 percent), demographic (25 percent), health or economic (36 percent), and criminal justice (73 percent) data. Although this practice increased in 2010 reports, Table 2 shows that reliance on these data was also common in 2000 reports. There is a small but notable change—from zero reports in 2000 to five reports in 2010—toward reliance on original survey data within these reports.

Table 3 highlights the relationship between the report information sources and methodological discussion components. From 2000 to 2010, the data indicates dramatic increases for all components—with an increase of 51 percentage points for reports that discussed methodology, 62 percentage points for reports that provided a formal section on methodology, and 14 percentage points for reports that discussed limitations for the chosen methodology. This trend was evident regardless of the source of information. Among 2010 reports that included health or economic data, 89 percent discussed methodology, 77 percent included a formal methodology section, and 27 percent provided details on methodological limitations. In spite of these changes, there remains less discussion of limitations, such as unusually abbreviated time periods for

²²Primary non-testimonial information refers to original information collected by the organization from sources other than witness testimony or interviews.
investigation or especially difficult-to-access to target populations. Even among 2010 reports, less than one-third of reports percent discussed limitations—almost regardless of the data source. Collectively, these observations suggest that AI and HRW increasingly reflect on methodological choices and value transparency, but they do not always overtly describe potential limits associated with their decisions.

The data set only provides a snapshot of fact-finding practices for two organizations. By virtue of their size and funding, AI and HRW are not representative of all advocacy-oriented, fact-finding organizations—which have expanded greatly between 2000 and 2010. Yet these organizations remain important leaders that have, arguably, had a genre-defining influence on the fact-finding reports. The data set may therefore suggest greater interest in diverse information sources and greater awareness of methodological considerations within the broader advocacy community. The remainder of this chapter draws on AI and HRW reports, but also identifies examples from a variety of organizations in different parts of the world, where relevant.

### C. Current Debates and Future Questions

The practices identified in the AI and HRW reports are consistent with many other commentaries on the trajectory of human rights fact-finding. New data sources and modern

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23 There is no single directory for human rights organizations around the world. A sense of the geographical spread of such organizations can be gained by using the term ‘human rights’ to search the UN database of NGOs with consultative status, available at: http://esango.un.org/civilsociety/login.do.

24 It is also evident in chapters within this volume, such as Meier’s discussion of crowd-sourcing technologies.
Theoretical tools vary widely—ranging from analyses of satellite imagery provided by the American Association for the Advancement of Science to estimates of conflict-related deaths conducted by the Human Rights Data Analysis Group. Drawing on trends related to data collection and examination within social science, non-governmental organizations increasingly use such data and tools to document, classify, monitor, contextualize, prescribe, and advocate in response to rights violations. Their efforts promote a broader movement toward ‘evidence-based human rights’ research.

This trend has catalyzed significant debate within the human rights community. Supporters highlight the potential for social science methods to help human rights investigators identify rights violations, contextualize broader patterns, and determine individual responsibility—advantages they suggest will improve advocacy and hasten social change. Yet others stress risks associated with the ‘technicalization’ and ‘standardization’ of human rights fact-finding. Among many criticisms, three are especially prominent. First, some advocates contend that greater reliance on quantitative data obscures qualitative realities of human rights violations—essentially leading fact-finders to favor a ‘technology of distance’ over a ‘responsibility to the story.’ Second, other observers worry that a growing emphasis on technical tools will reproduce hierarchies—effectively ensuring that fact-finding will remain an elite activity, carried out … by a class of professionalized “experts,” often based in the global north, conducting their “fieldwork” at sites … often located in the global south. Many fear the rise of a ‘cult of statistical significance’ that favors abstract debates about statistical artifacts to the exclusion of tangible narratives of human rights violations. Finally, some argue that quantification is a Trojan horse, appearing to improve rigor but ultimately delegitimizing the very qualitative evidence that is often central to human rights advocacy and justice-seeking.

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25 Landman and Carvalho note: ‘The measurements and monitoring of human rights has been a mainstay activity of human rights non-governmental organizations (NGOs) primarily for advocacy purposes and since the 1980s has become increasingly important for a wide range of human rights scholars and practitioners working across the broad spectrum of human rights issues areas from many different disciplinary perspectives.’ Landman and Carvalho, supra note 6, at 2.


28 Landman and Carvalho, supra note 6.

29 Jacobsson, ‘Standardization and Expert Knowledge’, in N. Brunnson et al. (eds), A World of Standards (2000), at 49. See also Merry, supra note 2, at S88.


31 Porter, supra note 5, at ix.


34 Ziliak and McCloskey, supra note 5, at 2.

Although these debates raise important questions about the potential risks associated with a turn toward quantitative or technical strategies, they often avoid a more foundational question for the fact-finding community: as human rights investigators increasingly rely on social science data and tools, to what extent do—and can—they follow the same disciplinary standards that guide and constrain social science researchers? This chapter suggests that it may be fruitful to consider the ‘framework for each research approach’—rather than relative merits of quantitative and qualitative strategies. Indeed, regardless of the data or tools, all investigative endeavors must address a fundamental question: does a given methodology provide the best means to reliably and validly answer the investigative question, according to accepted norms and principles within the community? With this query in mind, debates might constructively shift from a focus on the distinctions between social science and human rights approaches to a focus on the shared ‘norms and principles’ that may inform current and future fact-finding.

In contrast to other policy-focused fields such as public health and development economics, the human rights fact-finding community has devoted limited attention to openly identifying common principles, components, and methodologies in its investigatory processes. While such conversations often occur within individual organizations, broadening the discussion to allow human rights investigators to engage in an open and inclusive conversation may enable the community to better identify trade-offs and maximize strategies associated with various social science tools in the fact-finding context.

2. A Social Science Discipline of Human Rights Fact-Finding?

Before examining complementary features of social science research and human rights fact-finding, it is necessary to briefly consider the feasibility of this endeavor. Might human rights and social science epistemologies fundamentally clash? Although there are key areas of divergence, this section suggests that they are not prohibitive, and demonstrates that there are many convergent objectives and ways of knowing. As King, Keohane, and Verba generally define, the ‘distinctive characteristic that sets social science apart from casual observation is that social science seeks to arrive at valid inferences by the systematic use of well-established procedures of inquiry.’ To the extent that human rights fact-finding follows specific procedures to derive

36 King, Keohane, and Verba, supra note 7, at 3.
37 As many social scientists now recognize, ‘good quantitative and good qualitative research designs are based fundamentally on the same logic of inference.’ King, Keohane, and Verba, ‘The Importance of Research Design in Political Science’, 89 Am Pol Sci Rev (1995) 475, at 475. In other words, all social scientists—from the qualitative anthropologist using participant observation to the quantitative political science scholar running regressions—are ‘attempting to infer beyond the immediate data to something broader that is not observed.’ King, Keohane, and Verba, supra note 7, at 8. Even scholars who oppose many of the tools and methods supported by King, Keohane, and Verba agree on this fundamental objective. Brady, Collier, and Seawright affirm: ‘[W]hile analysts have diverse tools for designing, executing, and evaluating research, it is meaningful to seek shared standards for employing such tools. These shared standards can facilitate recognition of common criteria for good research among scholars who use different tools. Methodological pluralism and analytic rigor can be combined.’ Brady, Collier, and Seawright, ‘Refocusing the Discussion of Methodology’, in H. Brady and D. Collier (eds), Rethinking Social Inquiry: Diverse Tools, Shared Standards (2004) 3, at 7. See also Epstein and King, supra note 10 (distilling “the rules of inference” from social science and adapting them for legal research).
38 King, Keohane, and Verba, supra note 7, at 12. As noted above, the fact-finding community is consistently evolving. This chapter partially aims to contribute to a broader conversation on accepted norms and principles.
39 See supra note 6.
40 King, Keohane, and Verba, supra note 7, at 6.
factual accounts, it is thus *already*—at least partially—a social science discipline. The following section briefly examines this notion.

### A. Divergent Perspectives, Convergent Objectives

Key distinctions between social science and human rights are rooted in the often normative and instrumental interests of the human rights advocacy community and the academic and epistemological commitments of the social science research community. Whereas social scientists seek to explain empirical observations and develop corresponding theories according to agreed-upon ways of knowing, human rights investigators desire to marshal facts they ‘find’ about normatively-defined human rights violations in order to generate social, legal, and political change in the real world as expeditiously as possible.\(^{41}\) Social science researchers have the freedom to select cases with features that are amendable to ideal types of data collection and analytical examination.\(^{42}\) Human rights investigators, on the other hand, select their cases based on normative imperatives—a violation, the deprivation of a person or community in a situation where advocacy may have a positive impact and ‘do no harm’—coupled with strategic considerations about when, where, and how their work might be most effective. For these reasons, HRW investigators distinguish ‘research’ from fact-finding: ‘[We do] not generally identify its work as ‘research’, defined as seeking to develop “generalizable knowledge.” Rather, our investigations seek to document and respond to specific human rights abuses, monitor human rights conditions, and assess human rights protections in specific settings.’\(^{43}\)

Although these conceptual differences are significant, they are often less pronounced in practice, where objectives and challenges frequently converge. On the one hand, apart from strictly normative concentrations, human rights investigators often have distinctly descriptive and explanatory objectives, occasionally leading them to adopt methods that are identical to those of social science.\(^{44}\) For instance, human rights investigators often structure their data collection in ways that explicitly allow for conclusions concerning complex dynamics that extend beyond the individuals interviewed.\(^{45}\) Social scientists similarly probe difficult issues that are not amenable to ideal research methodologies, sometimes leading them to undertake projects that appear very similar to human rights investigations.\(^{46}\) For example, the *Voix des Kivus* project in the Eastern Congo investigated the relationship between international development aid and patterns of civil

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\(^{41}\) Gready, *supra* note 32, at 189.

\(^{42}\) Gready, *supra* note 32, at 182.

\(^{43}\) Todrys *et al.*, ‘Imprisoned and imperiled: access to HIV and TB prevention and treatment, and denial of human rights, in Zambian prisons’, 14 *J Int’l AIDS Society* (2011) 1, at 3 (internal citations omitted). This passage was included to explain why HRW does not fall within the purview of federal regulations and procedures concerning research with human subjects.

\(^{44}\) Sano and Thelle, *supra* note 27, at 93.


violence in that region by collecting data on security incidents.\(^{47}\) On the other hand, despite debate over the content and mode of enforcement for the ethical obligations of human rights fact-finders, investigators nevertheless face ethical challenges much like those applicable to social science researchers, including victim safety and confidentiality.\(^{48}\) Likewise, both communities confront challenges related to monetary and other important resources—though such limits may seem particularly restrictive to human rights investigators, who require rapid distribution of their findings to achieve their primary objective.\(^{49}\) Even as human rights investigations traditionally focus upon comparatively small data sets within a narrow time range,\(^ {50}\) human rights investigators and social science researchers often struggle to make broader legal and policy recommendations based on findings.\(^ {51}\)

In sum, by relaxing strict distinctions between social science and human rights, it is possible to identify at least three common objectives. First, both social science researchers and human rights investigators seek to identify valid facts amidst difficult social, economic, and political circumstances.\(^ {52}\) Second, both communities engage in inferential processes—‘using observations from the world to learn about other unobserved facts.’\(^ {53}\) Third, both social science researchers and human rights investigators seek to relate findings to broader policy and scholarly debates.\(^ {54}\) Indeed, it is no longer uncommon to find both human rights reports and social science studies that identify an underexplored rights violation, estimate the scope and causes of the violation, and provide violation-reducing recommendations.\(^ {55}\)

B. Possibilities for Greater Convergence

Given that social science research and human rights investigations often share a set of common objectives, is it possible to envision an emerging social science discipline of human rights fact-finding? To do so requires researchers and investigators to explicitly consider how to integrate normative values with empirical strategies, identifying mutually-reinforcing investigative processes. Freeman contends that this pursuit is worthwhile, remarking: ‘The concept of human rights lies in a domain in which normative philosophy, law and social science meet. … Understanding human rights requires us to understand both the contribution and the limits of philosophy and science.’\(^ {56}\) Although the following sections probe the possibilities for greater


\(^{48}\) Gready, supra note 32, at 181. Human rights NGOs routinely train their personnel on informed consent and victim protection, and have extensive protocols for ensuring ethical fact-finding.


\(^{51}\) In a report on Zambia, HRW’s recommendations focus on Zambian prisons generally, not only on the specific prison under investigation. See HRW, supra note 45, at 124-131.

\(^{52}\) Questions as to whether it is possible to ever objectively locate the truth are beyond the scope of this chapter. The claim here is simply that both groups seek to find the truth—regardless of subjective preconceptions.

\(^{53}\) King, Keohane, and Verba, supra note 7, at 8.

\(^{54}\) King, Keohane, and Verba remark, ‘science at its best is a social enterprise.’ Ibid., at 9.


\(^{56}\) Freeman, supra note 49, at 99.
convergence, this chapter does not contend that human rights fact-finding can or should adopt all disciplinary conventions that are common in social science. Rather, given the topical and geographic diversity of human rights fact-finding, it contends that a deeper understanding of social science conventions can provide a conceptual foundation for future conversations on the most appropriate fact-finding conventions. In both descriptive and prescriptive modes, the chapter suggests that this foundation favors ‘not dogma, but disciplined thought.’ In other words, this search for commonality is not intended to constrain investigative creativity or ingenuity; rather, it is meant to suggest that a ‘dynamic process of inquiry’ is possible ‘within a stable structure of rules.’ Indeed, it should rarely—if ever—limit investigators’ freedom to focus on specific questions or observations that are most likely to promote rights improvements within certain environments. Ongoing practices within the human rights community, however, demonstrate that opportunities remain abundant. In these cases, a common conceptual foundation can help investigators identify positive practices, clarify practical trade-offs, develop strategies to maximize tools, and share insights with other fact-finders.

3. Foundational Values and Principles for Inquiry

Foundational social science values and principles can—and already do—guide human rights fact-finding practices. The following section first clarifies the meaning of science within social science research. It then examines relevant applications to human rights investigations.

A. Social Science Principles

Social science generally aims to make descriptive or explanatory inferences about the observable world. From this perspective, it focuses on empirical observations. What features characterize scientific research? Although some observers define science in terms of theory development or knowledge accumulation, empirical research within the social sciences tends to adhere to four core values or principles.

First, scientific research makes descriptive or explanatory inferences based on empirical observations. This requires systematic collection of quantitative and/or qualitative data—followed by an effort to use this data to determine additional but unknown information. For example, a

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57 Although there will be exceptions to common standards, this chapter focuses on standards for most cases.
58 King, Keohane, and Verba, supra note 7, at 7.
59 King, Keohane, and Verba explain: ‘[T]he scholar must have the flexibility of mind to overturn old way of looking at the world …. However, if the researcher’s findings are to be valid and accepted by scholars in this field, all the revisions and reconsiderations must take place according to explicit procedures consistent with the rules of inference.’ King, Keohane, and Verba, supra note 7, at 12.
60 More rigorous data will not always correlate with more effective change. Human rights investigators know this well and necessarily consider advocacy objectives before selecting their research designs.
61 Brady, Collier, and Seawright observe: ‘Research design involves fundamental trade-offs. … A basic goal of methodology should be to establish shared standards for managing these trade-offs. Shared standards can become the basis for combining the strengths of qualitative and quantitative tools.’ Brady, Collier, and Seawright, supra note 37, at 14.
62 King, Keohane, and Verba, supra note 7, at 7.
64 The following discussion draws on a four-part definition in King, Keohane, and Verba, supra note 7, at 7-9.
65 Ibid., at 7-8.
researcher may collect survey responses from a representative household sample to estimate characteristics for a total household population. Alternatively, she may engage as a participant observer in community meetings to identify local concerns.

Second, scientific research relies upon a ‘set of rules of inference on which validity depends.66 The range of subjects for scientific inquiry are potentially infinite, and the unifying features of scientific inquiry relate to the methods themselves.67 For instance, when developing a survey sampling strategy, a researcher may rely on accepted conventions that other researchers have repeatedly proven effective. When presenting data from participant observation, she may similarly rely on accepted conventions that will resonate with the intended audience.

Third, scientific research uses public or transparent methods to create and examine information. The rationale is straightforward: ‘if the method and logic of a researcher’s observations and inferences are left implicit, the scholarly community has no way of judging the validity of what was done.’68 For instance, a researcher using a survey may report the sample size and selection process so that other researchers may identify possible biases. A researcher using participant observation may similarly report the methods she used to gain entry to specific subgroups within a community and the techniques she adopted for interacting with participants.

Fourth, scientific research recognizes, estimates, and reports uncertainty. Since perfect information is never fully obtainable, researchers have an obligation to account for imperfections when formulating conclusions, especially recommendations.69 For example, a researcher using a survey may report the variance or standard error associated with total population estimates. A researcher using participant observation may report on the extent of immersion within a community and suggest possible observation limitations.

These four principles provide foundational standards for scientific inquiry. They also encompass core values for social scientific research—despite debate and development over time. Most notably, these values include systematic data collection, reliable methodological examination, transparent reporting practices, valid examination practices, and accurate or unbiased analytical conclusions. To what extent does fact-finding incorporate these values and principles?

B. Fact-Finding Applications

Although the wholesale application of rigid scientific values and principles might threaten to inappropriately constrain human rights investigators, adapted versions can be found in many existing practices. Yet key limits relate to agreement on norms and principles to guide methodological choices, specific forms of transparent reporting, and the formulation of uncertainty estimates. In these cases, there remain opportunities to further adapt social science values and principles for human rights investigations.70

First, human rights fact-finders implicitly strive to make descriptive and explanatory inferences about rights violations and responsible actors based on empirical investigation (‘fact-

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66 Ibid., at 9 (emphasis added). See also Epstein and King, supra note 10.
67 Ibid.
68 Ibid., at 8.
69 Ibid., at 8-9.
70 Existing guidelines typically relate to discrete parts of the fact-finding process, such as victim interviews. Freeman advocates, ‘Somehow the analytical rigour of science and ethical seriousness [of human rights] have to be brought together.’ Freeman, supra note 49, at 99.
finding’). Such investigations need not depend on complex explanatory analysis to implicate inference; rather, inference is implicit every time that investigators identify and describe one or more cases as demonstrative of a larger pattern—however small, isolated, or indeterminate. For example, when an investigation documents previously unknown rights violations, inference is at work in the violations’ description. For example, in a 2010 report, HRW presents examples of a wide range of abuses faced by migrants to Thailand, suggesting that the abuses are illustrative of broader patterns. In addition, fact-finders often generate findings in a systematic manner. The large organizations under discussion provide in-depth training to their researchers and require that certain processes are followed consistently. While this kind of on-the-job training may be less intensive than the disciplinary training in social science, the desired outcome is similar.

Second, many human rights investigators already rely upon social science tools to ‘provide valid, reliable, and meaningful measures of human rights.’ Sano and Thelle observe that much academic human rights research ‘follows the general laws and criteria for sound and reliable research such as the validity and representativeness of the data used, clarification of basic premises and possibly relating to a body of theoretical literature.’ This is also true for many fact-finding reports. For instance, in a 2010 report, AI combines information from both individual interviews and focus group discussions conducted by the organization. It includes a formal methodology section and extensive historical chapters that cite to anthropological, ecological, and legal sources.

Third, there is some progress toward the transparent disclosure of methods in human rights reports. Data in Table 3 indicate a trend toward formal report sections devoted to methodology discussions. Although ethical obligations—such as requirements for the protection of victims and partner organizations—can necessarily limit complete disclosure of procedures, the principle of methodological transparency is consonant with broader human rights commitments. For example, in a 2010 report, HRW includes a formal methodology section that presents information about informed consent, the voluntary nature of interviewee participation, and confidentiality protections.

Fourth, there is less progress toward uncertainty estimates within human rights reporting. Data in Table 3 also demonstrate that few reports discuss methodological limitations. Although some human rights advocates may fear that this practice could discredit their findings, it might

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71 Epstein and King make a similar argument about legal scholarship: law review articles ‘evince a common characteristic: a concern, however implicit, with empiricism—basing conclusions on observation and experimentation—and inference—using facts we know to learn about facts we do not know.’ Epstein and King, supra note 10, at 2 (internal citations omitted).

72 Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand* (2010). The report uses language like the following to suggest the illustrative nature of the individual cases: ‘Aye Aye Ma’s experience with law enforcement is not uncommon. While it is possible for migrant workers to achieve a measure of justice in certain high profile cases, the norm is one in which police discretion is paramount, and impunity for abuses against migrants is pervasive.’ Ibid., at 5.

73 Landman and Carvahlo, supra note 6, at 127.

74 Sano and Thelle, supra note 27, at 93. Although Sano and Thelle primarily discuss academic human rights research, academic efforts demonstrate that the topic area does not prevent valid and reliable research strategies.


76 Ibid.

77 Replication is a key scientific objective that follows from methodological transparency. Although this is an ideal objective for both social science and human rights, the complex and temporary nature of many social phenomena limit realization.


Satterthwaite & Simeone, 17 July 2014
instead confer greater legitimacy on report conclusions by demonstrating that the researchers are working to adhere investigative standards—even if they are not always possible in the difficult circumstances of human rights practice. For instance, in a 2010 report, HRW explains that more than 70 interviews with ‘victims of and witnesses to human rights abuses and laws-of-war violations’ were carried out in a refugee camp in Kenya because the organization did not have safe access to Somalia.\footnote{Human Rights Watch, \textit{Harsh War, Harsh Peace: Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia} (2010), at 6.}

In sum, embracing while adapting common social science principles could strengthen human rights investigations and reports. This conclusion is also true for social science values related to systematic research, reliable methods, transparent reporting, and unbiased conclusions. These values have practical benefits—ensuring the investigations are as accurate as possible. Yet they also serve strategic purposes—conferring legitimacy and trustworthiness on fact-finders who wish to ‘speak truth to power’ in a world of ‘evidence-based policy.’ The next section examines the ways in which these principles translate into investigative components.

\section*{4. Common Components and Standards for Research}

Social science research examines a diverse range of social, economic, and political topics using a series of common components bound by identifiable standards. Thus, for social scientists, a ‘dynamic process of inquiry occurs within a stable structure of rules.’\footnote{Epstein and King, \textit{supra} note 7, at 12.} Although human rights investigators hold different normative commitments, advocacy objectives, and ethical imperatives, social science components can complement and strengthen existing human rights practices by suggesting common standards by which fact-finders can draw conclusions.

\subsection*{A. Social Science Components}

Social science research generally involves six primary components that are common to both inductive and deductive strategies. Rather than following a specific sequence, research is ‘a dynamic process conforming to fixed standards.’\footnote{Epstein and King, \textit{supra} note 10, at 54-55.} Figure 1 summarizes these non-sequential components: defining the research problem; specifying theoretical expectations; selecting cases and observations; drawing descriptive inferences; making causal or explanatory inferences; and reformulating prior theoretical expectations.\footnote{This figure is adapted and amended from a similar figure in Collier, Seawright, and Munck, ‘The Quest for Standards: King, Keohane, and Verba’s \textit{Designing Social Inquiry},’ in H. Brady and D. Collier (eds), \textit{Rethinking Social Inquiry: Diverse Tools, Shared Standards} (2004) 21, at 37. It describes the general research process advocated by King, Keohane, and Verba, \textit{supra} note 7. Although Collier, Seawright, and Munck disagree with many guidelines offered by King, Keohane, and Verba, they do not dispute the general research process. See Munck, ‘Tools for Qualitative Research’, in H. Brady and D. Collier (eds), \textit{Rethinking Social Inquiry: Diverse Tools, Shared Standards} (2004) 105, at 108-109.}

Social science researchers often define the research problem by selecting research questions that hold some practical importance in the real world.\footnote{King, Keohane, and Verba, \textit{supra} note 7, at 15. See also Epstein and King, \textit{supra} note 10, at 55 (quoting and citing King, Keohane, and Verba).} They also aim to contribute to existing scholarly debates.\footnote{King, Keohane, and Verba, \textit{supra} note 7, at 15-17.}

\begin{figure}
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\includegraphics{figure1.png}
\caption{Common Components and Standards for Research}
\end{figure}
researchers will often alter or abandon a research question that cannot be framed in a manner that allows for valid inference.\textsuperscript{85}

For academic and epistemological reasons, researchers also specify theoretical expectations. Theory-building is a core objective that allows research findings to contribute to a larger body of understanding on a given topic. Scholars in the Popperian tradition attempt to develop specific, concrete, and falsifiable hypotheses—expectations derived from prior analysis or ongoing research that could be proven wrong.\textsuperscript{86}

\begin{figure}
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\includegraphics[width=\textwidth]{figures/social_science_research_components.png}
\caption{Social Science Research Components}
\end{figure}

All social science research involves selecting cases and observations. Although the distinction between cases and observations can be subtle, cases are ‘broader research settings or sites within which analysis is conducted’ whereas observations consist of ‘pieces of data, drawn from those research sites, that form the direct basis for descriptive and causal inference.’\textsuperscript{87} As described in the next section, case selection often depends on the intended breadth of application for a given theory. When researchers aim to draw conclusions that extend beyond a given case or subset of cases,\textsuperscript{88} they typically select one or more cases that are representative of the broader population of concern\textsuperscript{89}—which is sometimes achievable through random sampling procedures.\textsuperscript{90} Similar standards apply to observation selection.\textsuperscript{91} Inductive research often favors fewer cases and

\textsuperscript{85} Ibid., at 18.
\textsuperscript{86} Ibid., at 19-20.
\textsuperscript{87} Collier, Seawright, and Munck, supra note 82, at 38. See also King, Keohane, and Verba, supra note 7, at 52-53, 117-118, 217-218.
\textsuperscript{88} King, Keohane, and Verba, supra note 7, at 126.
\textsuperscript{89} This is often described as avoiding ‘selection bias.’ See Seawright and Collier, supra note 63, at 305.
\textsuperscript{90} King, Keohane, and Verba, supra note 7, at 116, 129-132, 135.
\textsuperscript{91} King, Keohane, and Verba advise that researchers collect more observations in order to increase inferential leverage. Ibid., at 19, 23-24, 29-31. The authors within Collier and Brady partly disagree with this guidance—which
observations from which detailed analysis can suggest mechanisms and scope conditions. In turn, deductive research tends to favor more cases and observations in order to systematically account for alternative explanations.

Once observable information is available, researchers draw descriptive inferences. King, Keohane, and Verba explain, ‘All phenomena, all events, are in some sense unique. … The real question … [is] whether the key features of social reality that we want to understand can be abstracted from a mass of facts.’ This component can lead researchers to leverage case-based knowledge to create valid indicators, classify findings, and extract analytically relevant details. By doing so, social science researchers identify unexplained observations or surprising trends. Yet it is important that researchers employ reliable data collection procedures.

In conjunction, researchers often seek to make causal or explanatory inferences. Since causation is not usually witnessed directly, researchers must engage in a careful process of induction and/or deduction based on observable information. Many factors can challenge causal inference. In some cases, an unobserved variable can affect both the explanatory variable and the outcome variable—leading researchers to mistake correlation for causation. In other cases, the outcome variable may instead cause the explanatory variable—leading researchers to infer a reverse relationship. These common challenges can lead deductive researchers to collect large amounts of information to account for many alternative explanations. By contrast, inductive researchers often prefer to closely examine causal mechanisms in a specific context.

After conducting some research and analysis, social science researchers evaluate theories based on findings. As in any scientific discipline, research is an iterative, dynamic, and ongoing process. Researchers share their results with the scholarly community—whether or not results support the theoretical expectations. They also report key research procedures and possible limitations—allowing observers to evaluate the findings. If a theory appears correct in a specific context, researchers will often take steps to test the theory in other contexts. To what extent are these components and standards relevant for human rights investigators?

B. Fact-Finding Applications

Reflecting on these social science components and standards can inform how human rights investigations are—and might be—conducted. To begin, it is helpful to excavate the inferential work already being done by human rights advocates in light of social science procedures, then adapt those components to the advocacy objectives, ethical obligations, and communication strategies associated with human rights fact-finding. Figure 2 suggests a schematic of adapted, non-sequential fact-finding components: determining the advocacy objectives; clarifying ethical...
obligations; selecting cases and observations; formulating investigative questions; specifying contextual hypotheses; drawing descriptive inferences; making causal or explanatory inferences; and sharing findings with intended audiences. Grey circles indicate fact-finding components that differ significantly from social science components.

**Figure 2: Human Rights Fact-Finding Components**

Human rights investigators place particular emphasis on advocacy objectives. This step is critical for fact-finding, which intrinsically has a practical, real world purpose—to halt violations. Investigators are uniquely positioned to understand the strategic tools that will help to generate change. For instance, advocates may grasp a need to ‘establish denial of rights,’ ‘reveal breaches of obligation,’ or ‘justify new laws or policies.’\(^{101}\) Investigators will likely also contribute to an existing advocacy campaign or policy debate. For example, human rights investigators at NYU and Stanford Schools of Law have brought forward evidence of civilian harm from US drones strikes within a region in Pakistan.\(^ {102}\) Similarly, De Justicia has conducted a detailed analysis of Colombia’s compliance with United Nations Security Council Resolution 1325—which affirms rights for women in relation to peace and security.\(^ {103}\)

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\(^{101}\) Langford and Fukuda-Parr, ‘The Turn to Metrics’, 30 *Nordic J Hmn Rts* (2012) 222, at 222. These advocacy objectives can affect the descriptive and explanatory methods. See also Rosga and Satterthwaite, *supra* note 4, at 256.


Similarly, investigators emphasize ethical obligations. Although social science researchers have codified ethical responsibilities, fact-finders hold foundational obligations, based on human rights principles, to end abuses, prevent additional harm to survivors, ensure the dignity of all information providers, and adopt a rights-based approach wherever possible. For example, methods of questioning that may harm victims or risk re-traumatizing them are rejected. Ethical obligations also have important consequences for communication and methodological strategies. Even when quantitative information arguably provides greater inference, investigators still hold a ‘responsibility to the story,’ which may militate against quantitative methods in some settings, or specific data presentations in others. Likewise, security concerns may limit sharing of important information, such as a survivor’s identifying characteristics. For example, in a 2010 report, AI indicates that the names and identifying details of interviewees have been omitted or anonymized for their protection. The commitment to empowering those most affected by violations also influences method selection. For instance, in a study of the right to water in Haiti, investigators adopted intentionally inclusive methods and empowerment strategies that paired know-your-rights information with household surveys.

These advocacy objectives and ethical considerations guide case and observation selection. Human rights investigators may begin their work with individual reports about a specific type of violation or a broad pattern of abuses. In either case, they tend to seek as many cases and observations as they can feasibly document in order to illustrate the violation—often through service providers, partner organizations, or their client base. This can stand in stark opposition to social science research—which often selects cases and observations in specified ways that permit valid inference. But sometimes the difference is not so stark; some fact-finders explicitly embrace sampling methods when possible. For example, researchers from the University of California - Berkeley and Tulane University conducted a survey of workers at randomly selected addresses in post-Katrina New Orleans to identify and assess the magnitude of abuses against workers of various ethnicities and nationalities.

Other human rights investigators, even if not consciously adopting a sampling method, frequently begin their research with the objective of documenting a pattern of abuse. Numerous 2010 reports by AI and HRW specify that interviews suggest broader experiences—at least for those similar to the interviewees. In such instances, fact-finders may seek cases that illustrate such issues as the range of abuse, type of victim, identity of perpetrators, and motives for the violations. Many of these elements have a legal valence. In investigating police torture, for

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104 For example, in the United States, most academic scholars must submit protocols for research involving human subjects to an Institutional Review Board within their educational institutions.


109 This is not exclusively true. As described in the next section, data collection strategies often depend on the particular fact-finding objectives.


example, a researcher may document whether victims are predominantly from a specific ethnic group, which might indicate discriminatory behaviors. As investigators collect additional information, an organization may be able to more readily identify patterns. For example, in a 2010 report, AI argues, even though it was unable to conduct interviews in all relevant areas, ‘the testimonies from the areas covered in this report are emblematic of general patterns and trends of the human rights situation in’ the entire region. Desires to make this kind of statement create incentives for AI and HRW to strengthen the inferential logic that undergirds such claims. In recent years, fact-finders have begun to attend more explicitly to minimizing selection bias by adopting explicit case selection procedures. For example, in a 2010 report, HRW investigators examining prison conditions chose to interview prisoners who represented a range of demographic factors present in the prison population. In other instances, investigators have explicitly narrowed their focus to the ‘most troubled’ case—thereby drawing detailed conclusions based on periodic observations over multiple years.

Similar to social science researchers, fact-finders clarify investigative questions and formulate contextual hypotheses. Although these steps are not always addressed within reports, they are implicit in the fact-finding process. Due to their instrumental orientation, investigators formulate research questions to reinforce advocacy objectives. For example, an investigator who envisions a legal advocacy campaign will likely inquire about violations of a specific legal right or protection. Likewise, investigators commonly hypothesize—often based on contextual experience and knowledge—that specific groups are likely to face rights violations and certain individuals are likely to act as perpetrators. Yet the implicit nature of these processes may translate into lost opportunities to explore alternative constructions of research questions and hypotheses. Formulating queries that are specific and concrete—narrowly framed, clearly observable—and potentially disprovable, may strengthen the perceived objectivity of fact-finding reports—even if they emerge after some evidence has been collected. For example, in a 2014 report, B’Tselem implicitly questions whether restrictions on travel between Gaza and the West Bank have disrupted the right to family life under international law—hypothesizing that women have been particularly affected.

Likewise, fact-finders draw descriptive inferences. Although the methodological orientation necessarily depends upon the advocacy objectives and ethical obligations associated with a given situation, investigators often search for examples of rights violations within a given population, and less often, will draw estimates about the prevalence of rights violations for a total population. For example, in a 2012 annual report on human rights in Bangladesh, the human

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\[113\] See Todrys et al., supra note 43, at 2 (discussing HRW investigation).


\[115\] For example, a researcher with a concern for water rights may focus on whether an individual within a given geographic area has access to 20 liters of water per day, in accordance with minimum requirement established by the World Health Organization. See Center for Human Rights and Global Justice et al., Woch nan Soley (2009), at 34.

\[116\] For instance, the same researcher with a concern for water rights may hypothesize that foreign government officials have blocked international loans to provide water for specific cities or regions. See ibid., at 10-14.

\[117\] As human rights investigators increasingly rely on social scientific tools, it is likely that they will confront a trade-off between the breadth and depth of inquiry—as described in the next section.


\[119\] Langford and Fukuda-Parr, supra note 101, at 223.
A human rights organization Odikar compiles a wide range of descriptive data on the types of extrajudicial killings and torture incidents during the previous year. While some investigations draw descriptive inferences explicitly based on scientific standards, many reports do not explicitly mention these standards and some appear to violate them. Most of the 2000 and 2010 reports by AI and HRW do not describe a sampling strategy, making it difficult to assess even limited inferences. For example, in a 2010 report, AI makes the following statement without clarifying the inferential logic: ‘Most refugees, asylum-seekers and migrants, particularly those from sub-Saharan Africa, never feel secure in Libya.’ Many other reports generally refer to ‘most’ individuals within an affected group. For instance, in a 2010 report, AI concludes: ‘research reveals that for most asylum-seekers these rights are not respected in reality.’

In conjunction, human rights investigators also make causal or explanatory inferences. Human rights fact-finders often search for evidence that pertains to issues ranging from individual responsibility to circumstantial vulnerability to a rights violation. Causal inferences are often implicitly included in reports that link findings concerning specific victims’ experiences to particular laws, policies, or practices. They may also be implicit in organizations’ recommendations—which are often based on a belief that specific actions to alter the underlying causes of violations can lead to improved outcomes. For example, in a 2013 report, the South African Legal Resource Centre ‘explore[s] the connection between xenophobic sentiment, sexual violence and the impact it has on the lives of foreign women in South Africa.’ Although social science-based rules concerning which methods are appropriate for specific forms of inference may be overly restrictive in many human rights settings, careful attention to the kinds of data and analysis that might support causal inference are increasingly relevant to fact-finding. Similar to social science, investigators may therefore seek to leverage case-based knowledge to create valid indicators, classify findings, and extract analytically relevant details. At the same time, human rights fact-finders bear a responsibility to account for unobserved causal factors and potentially spurious correlations—which can easily result when investigators only have access to a small number cases and a limited number of observations. These eventualities, in turn, may lead future fact-finders to further articulate research limitations and/or seek additional corroborating information.

Although social science audiences can prove narrow, human rights investigators frequently seek to share findings with audiences that have widely varying training and experience. As a result, investigators must often tailor findings to grassroots organizers, government policymakers, international advocacy networks, tribunals, the press, and the broader public—all at the same

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124 Langford and Fukuda-Parr note that a human rights investigators increasingly feel pressure from other fields to make causal arguments. Langford and Fukuda-Parr, supra note 101, at 223.
126 Regardless of the objective, using ‘neutral, scale-able and externally verifiable methods’ can strengthen human rights fact-finding. Langford and Fukuda-Parr, supra note 101, at 223.
127 These are instances where investigators cannot randomly or intentionally select cases and observations.
time. In such cases, the form of communication will likely vary based on the most important target audiences. Whereas qualitative narratives may be appropriate for broad publicity campaigns, quantitative data points can provide ‘powerful … comprehensible, and simple snapshots of complex situations’ for policymakers. While these diverse audience characteristics separate social science researchers from human rights investigators, transparency principles may help human rights investigators to demonstrate the reliable and rigorous quality of findings. For instance, in a 2010 report, HRW includes a methodology section that identifies the repressive conditions under which fact-finding interviews took place and explains that investigators took specific steps to minimize the impact of these conditions, lending credibility to the report’s findings through transparency. Similarly, in a 2011 report, the Commonwealth Human Rights Initiative compiles documents on 33 district jails and 59 sub-jails based on numerous Right to Information requests to the Indian Government—but takes care to acknowledge: ‘the analysis and conclusions of this study are based on the assumption that the fullest information available with the jail was provided by the prisons.’ The report thus complements additional interview-based investigations.

In sum, social science research and human rights investigations share many common components. Furthermore, even as human rights investigations have distinct advocacy, ethical, and strategic objectives, it is possible to adapt common standards from social science to complement human rights fact-finding. In light of current debates over the role of emerging tools and methods for fact-finding, the following section explores circumstances in which certain qualitative and quantitative strategies are most likely to prove beneficial.

5. Available Tools and Methods for Analysis

For social science researchers and human rights fact-finders, common investigative components and standards necessarily form the foundation for making methodological decisions. In other words, research objectives guide analytical decisions within the context of common standards for reliable and rigorous inquiry. This section demonstrates that—as in social science—methodological decisions often depend upon the desired depth of explanation and breadth of application for the findings of a given investigation. This conceptual understanding can help human rights investigators to identify, optimize, and more transparently discuss methodological opportunities.

A. Social Science Methodologies

Social science researchers desire to contribute steadily—if only incrementally—toward broader theoretical and empirical understandings of the world. Since a research project could make many different contributions toward this objective, researchers often select narrow research

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129 Langford and Fukuda-Parr, supra note 101, at 223.
130 Freeman, supra note 50, at 99.
133 King, Keohane, and Verba, supra note 7, at 66-67.
questions that are designed to address missing information, perspectives, or explanations within an ongoing disciplinary debate.\textsuperscript{134} Narrow questions are also analytically beneficial because they allow researchers to develop specific and falsifiable expectations, collect concrete and detailed information, and select powerful and well-tailored methods—meaning that conclusions are as ‘precise and systematic as possible.’\textsuperscript{135} Despite infinite research categories, most social science research varies based on the desired depth of explanation and breadth of application.

**Figure 3: Social Science Objectives and Common Methodological Strategies**

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\caption{Social Science Objectives and Common Methodological Strategies}
\end{figure}

Depth and breadth can significantly affect methodological choices. On the one hand, the depth of questions varies along a continuum from highly descriptive to highly explanatory. Descriptive research aims to ‘extract the systematic features of a subject’\textsuperscript{136}—often by sifting data

\begin{footnotesize}
\begin{enumerate}
\item[134] Ibid., at 46.
\item[135] Ibid., at 44.
\item[136] Ibid., at 63.
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\end{footnotesize}
from complex cases and organizing information into relevant classes.\(^137\) Explanatory research aims to identify causal relationships—usually by identifying key explanatory variables and accounting for background variables.\(^138\) On the other hand, the breadth of questions varies along a continuum from highly specialized to highly generalized. Specialized research focuses on a small number of cases—often by capturing nuanced facets of a particular circumstance. Generalized research attempts to describe or explain a large number of cases—often by identifying core variables or conditions that apply to many circumstances.\(^139\) Figure 3 captures these two dimensions. It also identifies four conceptual objectives, suggests common data demands, and offers examples of quantitative and qualitative tools.\(^140\)

First, researchers may provide *specific descriptions*. Even when non-theoretical in orientation, this process encompasses a key aspect of social inquiry.\(^141\) Specific descriptions favor qualitative data—such as interviews, focus groups, or participant observations—that offer detailed insights into a particular case. Quantitative data, however, provides general details related to within-case observations. From a methodological perspective, researchers utilize numerous qualitative tools, including ethnographic study. They also leverage quantitative tools, such as sample surveys.\(^142\) Although common standards are relevant,\(^143\) researchers often grant less attention to unknown variables—since there is less interest in explaining outcomes. Similarly, case selection is less problematic because researchers rarely wish to extrapolate.

Second, researchers may provide *general descriptions*. As discussed above, a fundamental aspect of social inquiry involves using observed data to make inferences about unobserved information—even if researchers must form assumptions about unobserved information.\(^144\) Researchers collect information from a sample population to draw conclusions about a total population. In doing so, quantitative and qualitative data is often complementary. From a methodological perspective, researchers utilize inductive analysis to infer qualitative distinctions between different cases. They also rely more on quantitative tools—such as weighted surveys—to construct total population estimates.\(^145\) But data limitations and inferential standards are key. Researchers must account for unknown variables that may bias conclusions. They must also select representative cases when seeking extrapolation. Random sampling can sometimes address this problem.\(^146\)

Third, researchers may provide *specific explanations*. Developing and testing theoretical explanations is central to social inquiry.\(^147\) Many projects aim to unpack causal relationships under

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\(^137\) *Ibid.*, at 56.

\(^138\) Deeper explanation often implies a greater number of explanatory variables. Since experimental conditions are rarely replicable in the real world, social scientists must often seek to approximate these conditions by limiting variation related to background characteristics. See *Ibid.*, at 75-114.


\(^140\) Figure 3 captures conceptual distinctions that are meant to capture *most* cases. Exceptions are possible.

\(^141\) Popper argued, ‘there is no such thing as a logical method of having new ideas.… Discovery contains an “irrational element,” or a “creative intuition.”’ Quoted in King, Keohane, and Verba, *supra* note 7, at 14.

\(^142\) Seawright and Collier, *supra* note 64, at 273-313.

\(^143\) King, Keohane, and Verba emphasize, ‘Our descriptions of events should be as precise and systematic as possible’. King, Keohane, and Verba, *supra* note 7, at 44.

\(^144\) *Ibid.*, at 8. Indeed, these assumptions can hinder inference.


\(^146\) Broader estimates are often impossible when the researcher lacks knowledge of total population characteristics.

\(^147\) King, Keohane, and Verba, *supra* note 7, at 20.
certain circumstances. Researchers must therefore account for multiple explanatory variables while contextualizing analysis. A mixture of quantitative and qualitative is often desirable. From a methodological perspective, researchers may engage in process tracing—which involves careful, qualitative analysis of key causal steps. They may also utilize quantitative tools, such as matched pairs or similar cases, to account for unknown variables.\textsuperscript{148} Similar to general description, data limitations and inferential standards are especially important. Researchers must account for unknown variables that might bias explanatory conclusions. As with specific descriptions, case selection is less problematic because researchers select cases based on common characteristics—with less interest in broader applications.

Finally, researchers may provide general explanations. Many ambitious projects attempt to identify causal explanations that apply across time and cases. They consequently demand an extraordinary amount of information—which can be efficiently organized in quantitative form. Qualitative data can, however, provide useful illustrations and explanations—particularly for ‘outlier’ cases.\textsuperscript{149} From a methodological perspective, quantitative tools—such as multivariate regression models—capture variation. But qualitative researchers have also developed tools—such as comparative historical analysis—to assess complex relationships.\textsuperscript{150} Data limitations\textsuperscript{151} and inferential challenges\textsuperscript{152} nevertheless raise concerns over unknown variables and case selection procedures. There is also much division over proper specifications for statistical models—which has led some researchers to advocate for multi-method sequencing.\textsuperscript{153} To what extent are these methodological parameters relevant for human rights fact-finding?

\textbf{B. Fact-Finding Applications}

Human rights investigators aim to pose questions and obtain findings that bolster productive change. But they often confront severe data, time, and resource constraints\textsuperscript{154}—which can limit quantitative or qualitative methodologies otherwise available to social science researchers. Yet, as in social science, the investigative objectives still shape methodological decisions.\textsuperscript{155} When investigators pose precise questions and pursue systematic fact-finding, they often consider similar methodological options.

Again, depth and breadth can substantially affect methodological choices—with some adaptations for human rights investigations. On the one hand, the depth of questions also varies along a continuum from highly descriptive to highly explanatory. Although human rights investigators traditionally aim to identify and describe rights violations for public audiences,\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item Seawright and Collier, \textit{supra} note 63, at 273-313.
\item Seawright and Collier, \textit{supra} note 63, at 273-313.
\item Many ‘large-N’ data sets comprise coded information from reports published by the media, governments, and human rights organizations. But they can contain biases because those with the greatest access to primary data about rights violations—governments—often hide, destroy, or falsify data related to such abuses.
\item Goldstein, \textit{supra} note 3, at 614. Although social scientists often benefit from fewer time constraints, it is noteworthy that they also often face data and resource constraints.
\item Langford and Fukuda-Parr, \textit{supra} note 101, at 223.
\item Neier, \textit{supra} note 50, at 186-232.
\end{enumerate}
\end{footnotesize}
investigators increasingly desire to obtain explanatory findings that can inform policymaking audiences. The breadth of questions also varies along a continuum from highly specific to highly general. Figure 4 captures and expands upon these two dimensions.

**Figure 4: Fact-Finding Objectives and Adapted Methodological Strategies**

First, investigators may provide information about specific rights violations. Identifying rights violation examples is one of the most longstanding fact-finding goals. This process typically favors qualitative data collection, especially testimonial and forensic data—which reflects the community’s commitment to the ‘story’ and the empowered survivor. At the same time, fact-finders have begun to integrate quantitative data based on systematic collection of many individual cases. For example, The Human Rights Commission of Pakistan has tracked the names and dates

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157 There is also pressure from methodological advancements in related fields, such as health and development.  
of all persons reportedly disappeared from Balochistan since 2000.159 From a methodological perspective, fact-finders leverage existing expertise in conducting interviews with individuals affected by human rights violations.160 Content analysis—which can aggregate data from many interviews or focus groups161—may allow investigators to identify common themes across many interviews. As in social science, biases related to unknown variables and non-representative cases are less problematic in this instance. But investigators may struggle with balancing analytical interests against ethical obligations.162

Second, investigators may identify the magnitude or prevalence of rights violations. Some fact-finders seek to use observable rights violations to make inferences about the broader scope of violations for a given population.163 Since systematic measures of violations—especially grave civil and political rights—are rarely available,164 this information can prove powerful.165 From a methodological perspective, researchers have successfully used random sampling in some cases, such as obtaining casualty estimates following conflict.166 Others have applied estimation methods to ‘found’ data sets, based on a methodology developed by Patrick Ball, to estimate ‘the magnitude and patterns of’ certain types of violations.167 Fact-finders can benefit from a combination of quantitative data to define the scope of violations and qualitative information to clarify the nature of those violations. For instance, to estimate Colombia’s compliance with gender equality norms under United Nations Resolution 1325, De Justicia tracked several key indicators, including female representation in parts of government.168 Human rights investigators have also sought to combine survey data with individual interviews in order to present a general picture of rights

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160 Gready, supra note 32, at 178.

161 This process can be done with the assistance of qualitative data analysis software, such as ATLAS.ti. Details are available at: http://www.atlasti.com/de/index.html.

162 Gready, supra note 32, at 178.

163 In an online survey of rights advocates carried out by Joscelyne, Knuckey, Satterthwaite, Bryant, and Brown, approximately 25 percent of respondents used survey methods more than minimally; 29 percent used quantitative analysis of secondary data; and 28 percent used indicators. See ‘Mental Health Functioning in Human Rights Workers: Findings from an International Web-Based Survey’, Working Paper (2014).

164 Landman and Carvahlo, supra note 6, at 34; Goldstein, supra note 3, at 613-619.

165 For example, consider contentious debates over the number of civilians killed during the ongoing Syria conflict. See Cowell, ‘War Deaths in Syria Said to Top 100,000,’ NY Times (26 June 2013), available at: http://www.nytimes.com/2013/06/27/world/middleeast/syria.html.


168 De Justicia has begun to produce reports that pose more specific research questions. For example, see De Justicia, supra note 103.

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violations\textsuperscript{169}—and have even used innovative multi-method tools, such as crowd-sourcing platforms, to collect reports of election violence.\textsuperscript{170} As in social science, however, prevalence estimates can be complex and contentious. For example, voluntary reporting systems provide information that is skewed by its voluntary nature, even when participants share similar characteristics with members of the broader population.\textsuperscript{171} Given the sensitive nature of rights violations, reliable violation estimates for a small sample—let alone an entire population—can be difficult to construct.

Third, investigators may aim to draw explanatory inferences, such as determining individual responsibility\textsuperscript{172} or explaining forms of vulnerability. There is a growing interest in broader explanations for human rights violations\textsuperscript{173}—which can assist investigators who aim to make policy recommendations that reduce vulnerabilities. From a methodological perspective, investigators may draw on quantitative tools, such as quasi-experimental designs, that allow them to compare similar cases.\textsuperscript{174} At the same time, quantitative tools cannot replace proven qualitative methodologies. Investigators are especially adept at making causal process observations—often scouring public records and making documentary requests that reveal direct links between perpetrators and violations.\textsuperscript{175} As in social science, investigators must nevertheless consider potential alternative explanations.

Finally, investigators may seek to explain circumstantial vulnerability. There is a growing movement in favor of explanatory efforts that transcend individual cases. It is now common to find policy and scholarly research that offers explanations for violations across many countries and multiple decades.\textsuperscript{176} There are some examples of this type of research in advocacy settings, which seek to identify and predict multiple dimensions of individual susceptibility to rights violations.\textsuperscript{177} A need to account for many cases and explanations favors quantitative data collection—including indicators. But qualitative information—such as unexpected instances where rights violations are not evident—can provide enormously useful information for investigators seeking to identify policy recommendations. For example, Map Kibera developed a

\textsuperscript{169}See, e.g., Physicians for Human Rights, \textit{Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh} (2010), at 6, 15 (combining survey data from a purposive sample of 100 households with in-depth interviews with 25 refugees and additional key informants).

\textsuperscript{170}A prominent example is the Ushahidi platform, which allows for information collection, visualization, and mapping. Further details are available at: http://www.ushahidi.com/. It should be noted that there is a good deal of controversy over the usefulness of crowd-sourcing and its potential to be seen as something other than a convenience sample.

\textsuperscript{171}Such systems are necessarily anonymous and incident reports are therefore difficult to verify.

\textsuperscript{172}Advanced quantitative techniques have been used to identify responsibility for war crimes before international tribunals. One example is Multiple Systems Estimation. For a detailed discussion, see Lum, Price, and Banks, ‘Applications of Multiple Systems Estimation in Human Rights Research’, \textit{67 The American Statistician} (2013) 191.

\textsuperscript{173}Langford and Fukuda-Parr, supra note 101, at 225.

\textsuperscript{174}For example, an investigator may hypothesize that a government official from a given ethnic group restricts basic resources from districts with citizens from a different ethnic group. A quasi-experimental design might compare resource distributions to two districts that are very similar, except for their ethnic composition—before and after the official came to power.


\textsuperscript{176}This effort has been possible due to the creation of several time-series datasets that measure general human rights trends. The Cingranelli-Richards (CIRI) Human Rights Dataset is one of the most widely utilized datasets. For further details, see: http://www.humanrightsdatalab.org/.

\textsuperscript{177}See, e.g., Global Justice Clinic/Center for Human Rights and Global Justice, \textit{Yon Je Louvri}, supra note 55 (using quantitative household survey data to identify factors increasing vulnerability to sexual violence).

Satterthwaite & Simeone, 17 July 2014
grassroots-based delineation of health, security, education, water, and sanitation vulnerabilities in a major Nairobi, Kenya slum.178 From a methodological perspective, some of the most pragmatic quantitative tools involve reporting variance estimates and conducting significance tests—in order estimate accuracy for key findings.179 Yet human rights investigators may also adopt qualitative tools from social science that identify necessary and sufficient conditions for human rights violations.180 Ultimately, these methodologies favor investigators who have sufficient time and resources to account for unknown variables and alternative cases.

In sum, social science researchers and human rights investigators must confront similar questions when selecting data, tools, and methodologies. Both must carefully consider the objectives of the investigative endeavor and determine strategies by which to make valid inferences. Yet existing social science conventions do not provide a perfect model for human rights investigators—who will likely need to adapt existing conventions to practical fact-finding challenges. The final section briefly considers these realities.

6. Adapting Social Science Methods for Human Rights Realities

Common principles, components, and methodologies can guide investigative decisions. But conceptual social science ideals and practical human rights realities often diverge, meaning that social scientific conventions will not be appropriate for all human rights environments. Human rights fact-finders face two especially important challenges that can limit methodological opportunities—data limitations and resource constraints. Although the fact-finding community may draw lessons from multi-method approaches in social science, this section underscores a need for fact-finders to increasingly identify, share, and reflect upon promising strategies.

A. Data Limitations

Human rights fact-finding has traditionally used qualitative methods almost exclusively. Case-based research has focused on giving voice to those targeted for violations. Investigators increasingly seek quantitative measures to monitor violations, clarify responsible individuals, and improve policy recommendations.181 In comparison to qualitative data, quantitative data can help investigators refine measurements, test statistical significance, compare varying cases, and consider many possible explanations.182 Yet quantitative measures of violations are not always accessible or desirable. First, some rights violations are more readily observable than others. Data about highly charged, clandestine, and often unlawful acts like torture or extrajudicial execution

179 It is common for policy-oriented academic studies to report both 95 percent confidence intervals as well as p-value estimates along with data findings. Some human rights reports have done the same. See, e.g., International Human Rights Law Clinic, supra note 121; Global Justice Clinic/Center for Human Rights and Global Justice, Yon Je Louvri, supra note 55 (both adopting this approach).
180 Ragin has developed Qualitative Comparative Analysis that follows an analytical induction strategy. It tends to favor, however, research with a relatively small number of cases. See Ragin, supra note 139.
181 Langford and Fukuda-Parr, supra note 102, at 225.
are, by their nature, incomplete and fraught with inaccuracies. Second, in most cases, investigators must take care to identify ‘relevant aspects of “human rights”’ for measurement. Indeed, there are extensive debates over the positive and normative content of human rights, making the construction of metrics more than a technical exercise. Third, even when investigators can resolve definitional issues, data on human rights issues ‘necessarily will be “lumpy,” biased and incomplete.’ While this is especially true in relation to civil and political rights, data sets relevant to economic and social rights are often missing key variables. Efforts to create—or simply curate—data sets often require significant time and resources. Finally, human rights advocates correctly worry about the gap between global and local perceptions of technical measures. Even transnational measures must reflect ‘the lived experiences of real people under a variety of social, economic, political and cultural conditions.’ Despite these challenges, investigators need not wholly abandon this pursuit. They must instead seek to identify certain fact-finding objectives and circumstances that are well suited for quantitative data and tools—while still highlighting qualitative perspectives.

B. Time and Resources Constraints

Investigators must make difficult trade-offs when choosing potential objectives and strategies. Given time and resource constraints, fact-finders should face these trade-offs openly and make decisions based on specific fact-finding objectives. Although human rights investigations can achieve multiple objectives, rigorous and reliable methodologies often require a narrow scope of investigation. First, investigators must consider descriptive or explanatory objectives. Each has limits. Descriptive investigations can irrefutably expose a significant rights

183 Goldstein, supra note 3, at 615-617.
184 Langford and Fukuda-Parr, supra note 101, at 223.
186 Rosga and Satterthwaite, supra note 4, at 288-304.
187 Landman and Carvahlo, supra note 6, at 34.
188 For example, while extensive household-level data exists for certain elements of the right to water (e.g., such as accessibility and availability), it is missing for other elements (e.g., quantity and quality). See Langford and Winkler, ‘Quantifying Water and Sanitation in Development Cooperation: Power or Perversity?’, Harvard School of Public Health Working Paper Series (2009), available at: http://fxb.harvard.edu/wp-content/uploads/sites/5/2013/09/Langford-and-Winkler_Final-Working-Paper-92413.pdf.
189 Landman and Carvahlo identify four primary ways that human rights investigators organize data: (1) events-based observations; (2) standards-based indicators; (3) survey-based measures; and (4) socioeconomic and administrative statistics. Landman and Carvahlo, supra note 6, at 36-40.
190 See International Human Rights and Conflict Resolution Clinic and Global Justice Clinic, supra note 102, at 43-54 (providing an extensive analysis of the sources, methods, and limitations of several aggregators of data pertaining to U.S. drone strikes).
191 Goldstein cautions, ‘Even if problems of access and definition can be solved, enormous difficulties remain. Valid longitudinal or comparative work will typically require tediously applying definitions concerning human rights abuses to incident after incident; one cannot work with already processed data available from different sources using different definitions.’ Goldstein, supra note 3, at 619.
192 Landman and Carvahlo continue, ‘We must not lose sight of the fact that measurement is not an end in itself, but a tool with which to help people.’ Landman and Carvahlo, supra note 6, at 131.
193 Langford and Fukuda-Parr, supra note 101, at 238 (acknowledging ‘the need for a broad evidence base’).
194 The trade-off between breadth and depth of application is similar to the ‘intensiveness’ and ‘extensiveness’ trade-off offered in Landman and Carvahlo, supra note 6, at 35.
195 De Justicia has begun to produce reports that pose more specific research questions. See, e.g., De Justicia, supra note 103.
problem, but may not be able to rigorously evaluate possible policy solutions. Explanatory investigations may persuade technically-oriented policymakers, but may fail to garner significant attention from the general public. Second, investigators must weigh specific and general contributions. Specific case investigations can capture nuances of a particular violation and location, but may offer few broad-based insights. General investigations may speak to transnational audiences, but may fail to articulate issues in ways that are meaningful for grassroots activists. Finally, when considering both the depth and breadth of application, investigators ultimately confront short-term and long-term goals.\textsuperscript{196} Although a complex research design can favor comprehensive understandings of rights violations and identified multi-faceted reforms in the long-term, a more narrow effort may favor targeted reforms in the short-term.\textsuperscript{197}

\textbf{C. Methodological Trade-Offs}

A final set of trade-offs relates to the optimal tools for answering certain investigative questions. In many cases, as the desired depth of explanation and breadth of application increases, the relative advantages of qualitative, quantitative, and mixed data sources changes. This reality poses important methodological considerations. On the one hand, qualitative tools may favor thick descriptions of a specific case, but may fail to provide complete explanations across many cases.\textsuperscript{198} On the other hand, quantitative tools may favor thin explanations for many cases, but may fail to convey a tangible understanding for a given rights violation.\textsuperscript{199} In spite of these distinctions, fact-finders facing time and resource constraints may find that there are advantages to using a mixture of quantitative and qualitative tools. Goldstein summarizes, ‘What is needed is a combination: statistical information where it is meaningful and reliable, nonstatistical information where it is also meaningful and reliable, and judgment too.’\textsuperscript{200}

Although there is relative consensus on the benefits of multi-method strategies, investigators must find the appropriate balance in light of the specific fact-finding objectives.\textsuperscript{201} Three multi-method strategies from social science may help to inform fact-finding decisions. First, qualitative findings can inform quantitative analysis. After a detailed qualitative examination of causal relations within a subset of cases, investigators may use quantitative data analysis to establish similar patterns across a wider range of cases.\textsuperscript{202} Second, quantitative findings can inform qualitative analysis. Investigators may examine general patterns within quantitative data—and use those patterns to identify specific cases or circumstances that are amenable to detailed qualitative

\textsuperscript{197} This a key reason that fact-finders often begin investigations with a focus on advocacy objectives. There is also a trade-off between research scope and logistical viability. Landman and Carvahlo, \textit{supra} note 6, at 29.
\textsuperscript{198} The argument is not that qualitative tools \textit{cannot} provide complete explanations; rather, the argument is that there are \textit{advantages} in certain cases. Yet even in these cases, quantitative tools will rarely—if ever—wholly replace qualitative tools. Langford and Fukuda-Parr, \textit{supra} note 101, at 238 (‘[q]ualitative methods tend to be critical at all stages in the use of quantitative methods for human rights’).
\textsuperscript{199} In spite of certain limits, quantitative human rights datasets have improved. See Landman and Carvahlo, \textit{supra} note 6, at 127.
\textsuperscript{200} Goldstein, \textit{supra} note 3, at 627.
\textsuperscript{201} For instance, Freeman demonstrates that ‘[t]echnical differences in statistical methods can … lead to different substantive conclusions.’ Freeman, \textit{supra} note 49, at 142.
\textsuperscript{202} \textit{Ibid.}, at 175-176.

Tarrow argues, ‘Triangulation is particularly appropriate in cases in which quantitative data are partial and qualitative investigation is obstructed by political conditions.’ Ibid., at 178. For a fact-finding application, see Human Rights Watch, In Harm’s Way: State Response to Sex Workers, Drug Users, and HIV in New Orleans (2013) (using a ‘mixed-method approach that combined quantitative and qualitative interviews with key informant interviews and legal and policy analysis’).
Materials on problems of witness testimony and the standards of proof

Stuart Rabner (Chief Justice, New Jersey Supreme Court), Evaluating Eyewitness Identification Evidence in the 21st Century
87 N.Y.U.L. Rev. 1249

Thank you for inviting me to deliver the Eighteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice.

This evening, I would like to discuss eyewitness identification evidence and a recent decision by the New Jersey Supreme Court on this important topic: State v. Henderson. n1 In that case, the court unanimously concluded that the legal framework for analyzing the reliability of eyewitness identifications - which had been in place for decades - needed to be revised. n2 The court acted after reviewing hundreds of scientific studies and testimony by numerous experts, which cast doubt on well-settled law.

We found that "memory is malleable" and that "an array of variables can affect and dilute memory and lead to misidentifications." n3 Some of those factors are within the control of law enforcement; others are not.

We concluded that the legal test to measure eyewitness identifications did not provide a sufficient measure for reliability, did not deter misconduct, and overstated the jury’s innate ability to evaluate the reliability of eyewitness testimony. n4 To remedy those problems, Henderson announced two principal changes to New Jersey state law: (1) when defendants can show some evidence of suggestive behavior by the police, judges are to explore a broader array of factors at pretrial hearings to decide if the identification evidence is admissible; and (2) to help jurors weigh identification evidence that is [*1251] admitted, the court system must use enhanced jury charges tailored to the facts of the case. n5

Let’s explore how we reached that point, why we made those changes, and what lies ahead.

Introduction

For the past four decades, New Jersey case law has addressed various concerns that arise from eyewitness identifications. n6 In those cases, courts evaluated a variety of identification techniques: traditional lineup procedures that place a suspect among look-alike "fillers," photo arrays that mimic live lineups, showups that require witnesses to make an identification by looking at only one suspect, and other similar variations.

The fundamental aim of those identification procedures is clear: to find the guilty and protect the innocent. For example, lineups containing one suspect and five look-alikes force witnesses to probe their memories of the incident in question in search of a match. If the eyewitness’s memory is accurate and the lineup is effective, the eyewitness should be able to determine whether the suspect is the actual perpetrator.

In practice, of course, things are far more complicated. Memories not only fade, but also are malleable. Therefore, since the late 1960s, the U.S. Supreme Court has recognized that certain police practices are so suggestive, and so potentially manipulative of witnesses and their memories, that they violate the Due Process Clause of the Federal Constitution. n7 Leading up to Henderson, New Jersey courts attempted to evaluate eyewitness identification cases within the parameters set forth by the U.S. Supreme Court.

I

Early Treatment of Eyewitness Identification and the Manson/Madison Test

A. Pre-1977

In Simmons v. United States, decided in 1968, the U.S. Supreme Court explained that identification procedures violate due process if they are "so impermissibly suggestive as to give rise to a very [*1252] substantial likelihood of irreparable misidentification." n8 The Court did not detail what procedures might be so impermissibly suggestive as to be unconstitutional.
Three years later, the New Jersey Supreme Court had the opportunity to interpret Simmons in State v. Earle. n9 In Earle, a railroad patrolman named Joseph Lancellotti was severely beaten by four men in Newark's railroad yard. n10 The attack occurred at night, and the area was partially illuminated. n11 The victim briefly saw two of his attackers before another "struck [him] from behind with a hard object." n12 The assailants were not immediately apprehended, and over the course of about seven months, Lancellotti reviewed approximately 200 photos and saw fifteen live suspects but did not make an identification. n13

Seven months after the attack, a different railroad security guard arrested a man named Emanuel Earle for trespassing. The worker described the trespasser to Lancellotti, who went to the precinct and identified Earle as one of his attackers. The identification took place while Earle was in a jail cell with two men who looked nothing like him. n14

Based entirely on Lancellotti's trial testimony, the jury convicted Earle of "atrocious assault and battery." n15 The Appellate Division vacated the conviction. It found that "the victim had little alternative but to select the defendant" out of the three men, and that "once a witness misidentifies a suspect the probability is great that he will not retreat from that position." n16 The Appellate Division concluded that the identification evidence admitted at trial "did not measure up to the standards of fundamental fairness" and resulted "in a denial of due process to defendant." n17

The New Jersey Supreme Court reversed. In a per curiam decision, it rejected the notion that "due process is offended whenever a description of a suspect is given to the victim in advance of the identification." n18 At the same time, the court recognized the need to scrutinize eyewitness identification evidence. It therefore directed law enforcement officers to "make a complete record of an identification procedure if it is feasible to do so." n19

Though the decision is brief, it offers insight into the competing interests the court was grappling with. The court recognized the need to guarantee the reliability of identifications by mandating that the police record identification procedures. But the court also resisted excluding key testimony that it considered believable. As the court noted, "Lancellotti said he made the identification on the basis of his own recollection. That testimony was credible." n20 In short, the victim testified at trial, and the jury believed him. Absent the most egregious circumstances, the court seemed reluctant to prevent the jury from doing its job: evaluating the credibility of relevant evidence and making the ultimate decision about its reliability.

B. The Manson/Madison Test

In 1977, in Manson v. Brathwaite, the U.S. Supreme Court clarified the now well-known two-part test for evaluating eyewitness identification evidence. n21 New Jersey, like other states, adopted that test in the case of State v. Madison. n22

Under the Manson framework, courts first determine "whether the procedure in question was in fact impermissibly suggestive." If so, courts then decide whether there is a "very substantial likelihood of irreparable misidentification. In carrying out the second part of the analysis, ... courts ... focus on the reliability of the identification." n23

To assess reliability, courts must consider the following five factors:

(1) the "opportunity of the witness to view the criminal at the time of the crime";
(2) "the witness' degree of attention";
(3) "the accuracy of his prior description of the criminal";
(4) "the level of certainty demonstrated at [the time of] the confrontation"; and
(5) "the time between the crime and the confrontation." n24

[*1253] The Court explained that these factors had to be weighed against "the corrupting effect of the suggestive identification itself" in order to determine whether the identification was admissible. n25

Writing for the Court, Justice Blackmun stated that the balancing test would address three interests: reliability, deterrence, and the effect on the administration of justice. n26 He wrote that "reliability is the linchpin in determining the admissibility of identification testimony." n27 Deterrence, in turn, would derive from police officers "fearing that their actions will lead to the exclusion of identifications as unreliable." n28 Although Justice Blackmun
recognized that a per se rule of exclusion would have a "more significant deterrent effect," he noted that it might deprive jurors of reliable evidence and frustrate the aims of justice. n29

Underlying those aims, the Court relied on an important assumption: that jurors are able to discount untrustworthy eyewitness testimony. n30 As Justice Blackmun wrote, "we are content to rely upon the good sense and judgment of American jurors, for evidence with some element of untrustworthiness is customary grist for the jury mill." n31

II

Social Science Developments and Effects on Law and Policy

A. Social Scientific Landscape

Up to this point, I have described the evolving legal landscape. Equally important to this story is the development of social science.

In 1980, an accomplished New Jersey jurist wrote that "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" n32 That jurist was Associate Justice William Brennan. Although Justice Brennan's language is often cited in eyewitness identification case law and literature, its true attribution - which he provided - is not.

[*1255] The esteemed Justice was quoting directly from a 1979 book by psychologist Elizabeth Loftus titled Eyewitness Testimony. n33 In the 1970s, Loftus, among others, performed pioneering experiments on human memory. Some of those experiments focused on how memories can be distorted.

In one study, subjects were shown film clips of auto accidents and then asked to estimate the speed at which the cars traveled. n34 The way in which the experimenters phrased that question substantially altered the subjects' answers. Some subjects were asked, "About how fast were the cars going when they smashed into each other?" n35 Others were asked how fast the cars were going when they "contacted" each other. n36 The first group - that heard the word "smashed" - estimated a median speed of 40.8 miles per hour; the second group - that heard the word "contacted" - estimated an average speed of 31.8 miles per hour. n37 Changing one word drastically affected how people remembered an event.

Loftus published the results of a similar study the following year. n38 College students were again shown a film of an accident. Afterward, one group was asked to estimate how fast the car was going "along the country road." Another was asked to estimate the car's speed when it "passed the barn" along the country road. n39 A week later, all the students were asked if they had seen a barn in the film clip. About 17% of the students who had been asked the "passed the barn" question reported seeing a barn. Only 3% of the other group recalled a barn. n40 Yet there was no barn in the film. n41 Again, a simple suggestion had a strong effect on memory and led to faulty recollections.

Despite such experiments, none of the case law discussed so far engaged scientific findings in any meaningful way. Courts can only [*1256] consider the record before them. And in the 1970s, other than the Loftus studies, advocates had only a limited body of research to present. According to an expert who testified at a hearing in Henderson, there were "only four published articles in psychology literature [from the 1970s] containing the words 'eyewitness' and 'identity' in their abstracts." n42 By comparison, "more than two thousand studies related to eyewitness identification have been published in the past thirty years." n43

As research developed, social scientists continued to improve their understanding of human memory and the factors that increase the potential for misidentification. Scientists also continued to test assumptions embodied in case law.

B. Law Meets Science: Incremental Changes

Despite these scientific developments, state and federal courts continued to use the Manson/Madison test to evaluate the admissibility of eyewitness testimony. Twenty years after the publication of Eyewitness Testimony, however, New Jersey courts began to make incremental changes to the case law. In State v. Cromedy, the New Jersey Supreme Court examined numerous social science studies showing that a witness may have greater difficulty identifying a person of another race. n44 Because the jurors in Cromedy were not instructed on those difficulties, the court vacated the rape and robbery convictions based on a cross-racial eyewitness identification and ordered anew
trial. n45 Moreover, the court mandated special jury instructions to explain cross-racial bias in future cases. n46 DNA tests later exonerated Cromedy. n47

In State v. Romero, the New Jersey Supreme Court echoed the concern Justice Brennan had expressed more than a quarter century earlier that "jurors likely will believe eyewitness testimony 'when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.'" n48 The court reached its conclusion after citing social science research that detailed "the fallibility of eyewitness [*1257] identifications." n49 As a result, the court directed that juries be instructed that an eyewitness's "level of confidence, standing alone, may not be an indication of the reliability of the identification." n50

In another case, the court expanded its earlier mandate requiring police to record all identification procedures. n51 Relying on its supervisory powers under Article VI, Section 2, Paragraph 3 of the state constitution, the court ordered that "as a condition to the admissibility of an out-of-court identification, law enforcement officers [must] make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." n52 The expansion of the rule flowed from the court's "understanding of the frailty of human memory and the inherent danger of misidentification." n53

C. Policy Meets Science

As courts began to grapple with the reliability of eyewitness testimony, policy makers and law enforcement officials also acknowledged serious concerns about the dangers of misidentification. In 2006, the International Association of Chiefs of Police issued guidelines and cautioned that "great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification." n54 Those guidelines concluded that "of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." n55

New Jersey law enforcement had already taken steps to address potential problems with eyewitness testimony. In 2001, New Jersey's then-Attorney General, John J. Farmer, Jr., adopted guidelines to standardize eyewitness identification practices across the state. n56 The [*1258] guidelines followed recommendations issued by the Department of Justice and incorporated two decades of scientific research. n57 New Jersey was the first state to adopt those recommendations. n58

Under the New Jersey Attorney General's Guidelines, lineups and photo arrays should include only one suspect and a minimum of four or five fillers. Police officers should "avoid reusing fillers ... when showing [a witness] a new suspect," "ensure that no writings or information concerning previous arrest(s) will be visible to the witness," and "ensure that the suspect does not unduly stand out" from the fillers. n59 Officers should also "preserve the presentation order of the photo lineup" and perhaps the photos themselves. n60

The guidelines also outlined the following procedure for administering lineups:

1. To prevent the administrator from inadvertently influencing the eyewitness, the administrator "should be someone other than the primary investigator assigned to the case," and "should be careful to avoid inadvertent signaling to the witness of the 'correct' response"; n61

2. The administrator should instruct the witness that the perpetrator may not be in the lineup, and that the witness "should not feel compelled to make an identification"; n62

3. It is preferable to perform lineups sequentially, meaning that witnesses should be shown suspects one at a time, rather than simultaneously; n63 and

4. After an identification, the administrator should ask the witness "how sure he or she is." n64

[*1259] All of those efforts had the same goals: to reduce the suggestiveness of identification procedures and thus enhance the integrity of evidence presented to juries.

III

Reevaluating Eyewitness Identification
A. Limitations of the Manson/Madison Test

While law enforcement worked to improve identification procedures, New Jersey's courts continued to analyze cases that questioned those procedures within the parameters of the Manson/Madison test.

In 2008, for example, the New Jersey Supreme Court heard arguments in a case in which two defendants challenged the identification evidence against them. n65 The defendants were convicted of felony murder, multiple robberies, and various weapons offenses. n66 The State's evidence included eyewitness identifications by several robbery victims. The defendants moved to suppress those identifications before trial, and the trial judge held a hearing. n67

At the hearing, a detective testified as follows: He showed three robbery victims three photos - one for each of three suspects. He acknowledged the procedure deviated from standard practice and said that he would have acted differently if he had it to do over. n68 He showed another victim fifteen to twenty photos but admitted that the fillers were not similar enough to the suspects to be used in a proper array. He explained that he was pressed for time and could not locate more suitable photos. n69

Before displaying the pictures, the detective told the witness that "the people in [them] may be responsible for the robbery." n70 Afterward, the detective discarded all but the three photos that the witness selected. n71

The method the detective used was clearly flawed. Three of the procedures were equivalent to showups: A witness was shown a single picture and asked whether the person depicted was the perpetrator. A fourth procedure involved a photo array that failed to test the witness's memory because the fillers looked nothing like the suspects. In addition, the detective administered the procedures even though he [*1260] knew the identity of the suspects. He also not only failed to warn the witnesses that the suspects may not be in the lineup but specifically relayed the opposite when he showed the photo array. Finally, he failed to maintain a record of the identification procedure for later scrutiny.

Not surprisingly, the trial court found the procedures suggestive. The judge then dutifully applied existing law and concluded that the process was not so suggestive that the evidence had to be excluded. n72 In denying the motion to suppress, the trial court relied on the five familiar factors discussed above: The witnesses "had every opportunity to view the defendants at the time of the crime"; they "were quite certain about the identifications"; their prior descriptions were not inconsistent; their attention was "focused on the defendants"; and "the time between the crime and confrontation was ... relatively short." n73 At trial, the jury heard witnesses identify the defendants and later convicted them. n74

The defendants appealed. In this and every case, a trial judge's factual findings are entitled to great weight before an appellate court, n75 and there was ample credible evidence in the record for the judge to reach the conclusions he did. On appeal, therefore, the New Jersey Supreme Court applied existing precedent - the Manson/Madison test - and found that "despite the clear suggestive nature of the identification procedures, the identifications were reliable and did not result in a substantial likelihood of misidentification." n76

The ruling was correct. At the same time, it did not squarely address the detective's mistakes and, as a result, failed to deter similar conduct in future cases. In addition, the court declined the defendants' requests to alter the standard for admitting identification evidence, noting that defendants had failed to make a record or even argue the issue beforehand. That said, the court specifically encouraged the parties to develop a proper record in the future "to improve our standards for gauging the admissibility of out-of-court identification procedures." n77

It was not the first time we had made that recommendation. In State v. Herrera, a security guard was beaten unconscious and his car was stolen. Soon after, he described his assailant to the police. n78 They, [*1261] in turn, found the missing car in the defendant's possession. n79 Instead of performing a lineup or photo array, the police had the victim participate in a showup. Beforehand, the officers told the victim that he was going to confront the person who had been found with the stolen car. n80 The court found that the procedure was impossibly suggestive, but because the identification was reliable under the Manson/Madison factors, it was admissible. n81

In a supplemental brief to the New Jersey Supreme Court, the defendant for the first time argued that the standards for admitting showup identification evidence should be altered. n82 The court noted that if the defendant had submitted those arguments and "current research" on eyewitness identifications to the trial court, there would have been a proper record to evaluate. n83 Without a record, though, there was no basis to deviate from the U.S. Supreme Court's approach. n84
In 2009, yet another identification case was argued before the New Jersey Supreme Court. The defendant once again claimed that the police acted suggestively while showing a photo array to a witness. And once again, the defendant asked the court to adopt new standards for admissibility without a record that might support his position. Instead, the briefs simply cited extensive social science research, which appeared to raise serious questions about the standard in place. That case was State v. Henderson. n85

B. Creating a Record: Special Masters

To create a more useful record, the court appointed a special master. n86 That decision was consistent with the approach taken in previous cases when a better understanding and evaluation of scientific evidence was vital to resolve a matter.

In State v. Moore, for example, the court was asked to revisit a twenty-five-year-old ruling and determine whether hypnotically-refreshed testimony was admissible at criminal trials. n87 That type of testimony had been admissible under certain circumstances since [*1262] 1981, under State v. Hurd. n88 But in the years that followed, scientific evidence emerged that cast doubt on the reliability of such evidence. n89 In cases preceding Moore, though, the court declined to revisit the topic because "the parties had not presented expert testimony on the scientific reliability of post-hypnotic memory." n90

After granting certification in Moore, the court concluded that the case also lacked an adequate record to test the assumptions underlying a longstanding and important rule of law. It therefore ordered a plenary hearing before the trial court to create a fully developed record of the relevant scientific evidence. n91 The trial court heard testimony from three experts and reviewed the scientific literature presented. n92 Based on the evidence, it concluded that hypnotically-refreshed testimony should be banned. n93 After reargument and a review of the record, the Supreme Court agreed. n94

Similarly, the court appointed a special master in another case to review the reliability of a new breathalyzer test. n95 In that matter, twenty defendants challenged the admissibility of the results of the Alcotest device in their respective cases. n96 The court remanded the case to a special master and appointed a retired Appellate Division judge to assume that role. The court asked the special master to "conduct a plenary hearing on the reliability" of breath test instruments and invited him to entertain supplemental expert testimony, including independent experts he might select, and to allow amici to assist. n97 After four months of hearings and two reports, the special master concluded that the Alcotest device was generally scientifically reliable. n98 Based on the record and those reports, the court also found the breathalyzer test generally reliable. n99

Those cases shared a concern about the adequacy of the record and recognized that resolving a critical issue depended on developing such a record. Against that backdrop, we asked the special master in [*1263] Henderson to establish a record of the social science evidence pertaining to eyewitness identifications.

C. The Henderson Record

We appointed Geoffrey Gaulkin, a distinguished, retired Appellate Division judge, to preside on remand as the special master. n100 The offices of the Attorney General and the Public Defender, representing the respective parties, and two amici, The Innocence Project and the Association of Criminal Defense Lawyers of New Jersey, participated in the hearing. n101 The remand hearing spanned ten days and included testimony from seven expert witnesses. The parties created a record of more than 200 scholarly articles and more than 360 exhibits altogether. n102

Virtually all of the studies surveyed were published after Manson was decided in 1977. They consisted of peer-reviewed laboratory experiments, archival and field experiments, and meta-analytic studies. n103 The meta-analyses combined data from different experiments and provided greater statistical evidence of the factors that can affect memory and eyewitness identifications.

First, the record confirmed that misidentifications are the leading cause of wrongful convictions. Nationwide, around "seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." n104 Studies of police case files and field experiments buttressed that statistic. Four studies analyzed data from thousands of actual police records in Sacramento, California and London, England. Together, those studies revealed that up to about one-third of eyewitnesses who made identifications in police investigations wrongly identified a known innocent stand-in. n105 In field [*1264] experiments, researchers asked unassuming convenience store clerks to identify customers who had previously been in the store and had behaved in unique or
distinctive ways. Similar to the results from Sacramento and London, those studies showed that even when the target person was not in the lineup, eyewitnesses chose an innocent look-alike more than one-third of the time. n106

Second, the record revealed the extent to which memories are malleable. Memory does not operate like a video recording that can replay an event exactly as it happened. Instead, memory can be influenced and diluted by factors unrelated to a witness's actual recollection of a relevant event. Some of those factors - called system variables - are within the control of the police. Others - called estimator variables - are not.

To be sure, the idea that our memories are imperfect is not new. For decades, case law recognized those imperfections intuitively. n107 But the record produced in Henderson allowed the court, for the first time, to evaluate the individual factors that influence eyewitness memory using comprehensive, reliable scientific evidence. The scientific evidence addressed a large number of factors and revealed the following:

1. System Variables

These variables are within the control of the criminal justice system and can affect the reliability of an identification.

Blind Administration. If the person administering the lineup knows who the suspect is, the administrator can increase the [*1265] likelihood of misidentification by communicating information, even subtly and unintentionally, to the witness. This phenomenon is an example of what scientists call the "expectancy effect" - the tendency to get expected results by helping shape the response. n108 A meta-analysis examined 345 behavioral science studies and found that "the overall probability that there is no such thing as interpersonal expectancy effects is near zero." n109 To avoid the expectancy effect, lineup administrators should have no knowledge of who the suspect is. n110 Police departments with limited resources can make use of the "envelope method" - a technique in which an officer who is aware of the suspect's identity places individual lineup photos into different envelopes, shuffles them, and gives them to the witness. While the witness makes an identification, the officer refrains from looking at the envelopes or photos. n111

Pre-identification Instructions. Police should instruct witnesses at the outset that they are under no obligation to make an identification and that the suspect may not be in the lineup. One experiment revealed that when witnesses were given no pre-identification instructions, they chose innocent fillers from target-absent lineups 45% more often than witnesses who were warned that the suspect might not be there. n112

Avoiding Confirmatory Feedback. Similarly, if an officer says "good job" after a witness makes an identification, that may artificially enhance the witness's confidence in the identification. n113 Meta-analysis showed that across twenty studies of 2400 identifications, "witnesses who received feedback 'expressed significantly more ... confidence in their decision compared with participants who received [*1266] no feedback.'" n114 Witnesses who received feedback also tended to overstate the quality of their view of the events in question. n115

Multiple Viewings. Multiple viewings of the same suspects during an investigation can also affect reliability. Meta-analysis "revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot." n116

Showups. Showups, which are essentially single-person lineups, are inherently suggestive. Because there are no fillers, any mistaken identification by the witness can only implicate the suspect. A field experiment revealed that showups conducted immediately after an encounter can be as accurate as lineups. n117 But after two hours, "58% of witnesses failed to reject an 'innocent suspect' in a photo showup, as compared to 14% in target-absent photo lineups." n118

2. Estimator Variables

These variables can also affect reliability but are beyond the control of the criminal justice system.

Stress. Factors like stress, which are beyond police control, can substantially affect eyewitness memory. In a compelling study conducted by military researchers, 500 active-duty military personnel were subjected to interrogations that involved a high degree of stress (with real physical confrontation) or a low degree of stress (without physical confrontation). n119 They were later asked to identify their interrogators. Only 30% could accurately identify their high-stress interrogators, as compared to 62% who correctly selected their low-stress interrogators. n120
Weapon Focus. The presence of a weapon can distract a witness and affect the reliability of an identification if the crime is of short duration. In one experiment, half of the witnesses observed a person [*1267] holding a syringe in a manner that was threatening to the witness, and the other half watched a person holding a pen. n121 "Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33% from the second group." n122

Cross-racial Identification. Recent data from "thirty-nine studies and nearly 5,000 identifications” confirmed that it is more difficult for eyewitnesses to identify people of another race. n123

Co-witness and Private Actor Feedback. Research has shown that co-witnesses and private actors have the same potential as police officers to affect the reliability of eyewitness identifications. In one experiment, college students were shown a brief film and then read another witness's description of the events depicted. n124 Half of the students read narratives that included false details, like a description of someone's hair as wavy when it was in fact straight. n125 Thirty-four percent of those students "included a false detail - like wavy hair - when they later described the target. By contrast, only 5% of the students who read a completely factual narrative made similar mistakes.” n126

Event Factors and Witness Characteristics. The record also supported what we all know to be obvious: Duration, distance, lighting, disguises, memory decay, and a witness's level of intoxication can all affect the witness's ability to make an accurate identification. n127

Relative Judgment. Finally, once a witness is confronted with a lineup, he or she is susceptible to a psychological concept known as relative judgment. Simply put, people often compare faces in a lineup to one another, rather than to their actual memory of the perpetrator. They then choose the subject who most resembles their memory of the perpetrator in comparison to other lineup members. That, too, can lead to misidentifications. n128

3. The Role of the Jury

With those conclusions in mind, we considered the ability of juries to intuit scientific findings. In a survey of actual jurors in 2006, [*1268] fewer than half agreed with the importance of pre-lineup warnings, the effects of weapon focus and cross-race bias, and the accuracy-confidence relationship. n129 Although the State challenged that survey at the hearing, we gleaned from the available evidence that "people do not intuitively understand all of the relevant scientific findings." n130

Of course, cross-examination helps separate liars from truth tellers in many cases. But most eyewitnesses are not lying; they sincerely believe that they are telling the truth even if they have identified the wrong person. Witnesses who testify honestly but falsely are less susceptible to traditional efforts to show deception or bias through cross-examination. n131 Also, by the time eyewitnesses appear at trial, some may have received confirmatory feedback that gives them greater confidence in their identifications. Studies have shown that for juries, confidence appears to be the "[ ]most powerful predictor of verdicts' regardless of other variables.” n132

IV

New Jersey's New Framework

Other branches of government responded positively to the social science evidence. As discussed above, New Jersey's Attorney General issued new guidelines incorporating lessons learned from the scientific literature. Law enforcement agencies and state legislatures beyond New Jersey also implemented new procedures to improve the reliability of eyewitness identifications. The prevailing legal standard, however, remained essentially unchanged.

Our task, therefore, was to determine what the body of reliable scientific evidence meant for the Manson/Madison test. We ultimately concluded that the test did not meet its goals and did not satisfy due process under the New Jersey Constitution.

First, under the old test, courts did not consider the effect of estimator variables unless police procedures were "impermissibly suggestive.“ n133 In effect, relevant estimator variables like stress, lighting, and race, which can and do affect reliability, are ignored if an identification procedure was not impermissibly suggestive. n134

[*1269] Second, three of the five reliability factors can themselves be skewed by suggestive procedures. The three factors - the witness's opportunity to view the crime, degree of attention, and confidence - rely on self-
reporting by witnesses. But suggestive procedures can cause witnesses to be overly confident and to inflate the quality of their viewing conditions. n135

Third, those factors may actually encourage the very improper procedures they were meant to deter. "The more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions." n136 A more confident report from the witness on viewing conditions, in turn, makes it more likely that his or her testimony will be admitted under the current balancing test. n137

Fourth, the Manson/Madison test provided judges only two options: either suppress or admit eyewitness identification evidence. In practice, few judges choose suppression. An all-or-nothing approach is inadequate in light of the complexity of eyewitness identification evidence. n138

We therefore adopted two primary changes to address those shortcomings:

First, the court modified the nature of pretrial hearings to assess eyewitness identifications. The court determined that if a defendant could show some evidence of suggestiveness that could lead to a mistaken identification, he or she would be entitled to a hearing. n139 For the most part, that evidence must be tied to a system variable. n140 At the hearing, the parties may explore all relevant system and estimator variables, which the trial judge then evaluates to decide the overall reliability and admissibility of the evidence. n141 The opinion lists various factors that courts are to consider as part of that process. n142 In the end, defendants must still prove a very substantial likelihood of irreparable misidentification for evidence to be suppressed. n143

We rejected a bright-line rule that would require per se exclusion if the police violated certain recommended procedures. Instead, the more flexible framework detailed in Henderson tries to strike a vital [*1270] balance: protecting defendants' rights while enabling the State to meet its responsibility to protect the public. n144

We also refrained from ordering hearings in every case involving eyewitness evidence. As noted above, only system variables can trigger a hearing. In other words, there needs to be some indication that the police acted improperly - and if that assertion proves groundless, the court can end the hearing and admit the eyewitness identification evidence. n145

We focused on system variables in setting the threshold for a hearing for several reasons. First, courts are unlikely to suppress evidence based only on estimator variables. Second, the legal system cannot deter conduct outside the control of law enforcement. Third, from a practical perspective, pretrial hearings under the new framework will be longer and more detailed, and requiring hearings about estimator variables alone would "overwhelm the system with little resulting benefit." n146

We recognized that even when hearings are held, most identifications will still be presented to juries because of the heavy burden defendants must carry. That recognition led to Henderson's second principal change: Judges will now be required to give enhanced instructions to jurors about particular factors that may affect the reliability of an identification. n147 Those instructions should be tailored to the facts of the case. The goal underlying this approach is straightforward: to educate juries and to help them assess how much weight to give to eyewitness identification evidence. n148

[*1271]

A. Epilogue: The Next Thirty Years and Beyond

Not long after Henderson was published, social scientists announced the results of a new study relating to sequential versus simultaneous lineup methods - an area that Henderson found needed more attention. n149 Some day soon, a court may be asked to adopt those findings. That court will ask whether others in the scientific community have probed the results, whether knowledgeable experts have reached a consensus, and whether the findings have achieved "an impressive consistency in results." n150 The parties, in turn, will need to develop and present a thoughtful record for the court to review.

That review process will prevent today's findings from being frozen in time as new and important scientific findings emerge. It will allow police departments to make improvements to their procedures, and it will permit courts to revise factors used to judge the reliability of eyewitness identifications - to ensure that those factors are consistent with reliable, scientific evidence.

The decision in Henderson acknowledges that it does not mark the end of the path. n151 Henderson notes that our understanding of memory has evolved markedly during the past thirty years. And what we know now may seem
rudimentary thirty years from today. As a result, the factors that jurors will use to evaluate eyewitness evidence are not set in stone, but they must be based on reliable, generally accepted scientific evidence. n152

Earlier this year, the U.S. Supreme Court addressed a different question relating to eyewitness identification in Perry v. New Hampshire. n153 In Perry, an eyewitness told police that she saw a man breaking into cars parked in the lot of her apartment building. When an officer asked for a more specific description, she "pointed to her kitchen window and said the person ... was standing in the parking lot, next to [a] police officer." n154

The Court held that the Due Process Clause was not implicated because the police did not arrange the unduly suggestive identification procedure. As a result, the Constitution did not require any pretrial [*1272] screening for reliability. n155 In its opinion, the Court identified other safeguards that "caution juries against placing undue weight on eyewitness testimony of questionable reliability." n156 Among those protections, the Court highlighted "eyewitness-specific jury instructions." n157

Justice Sotomayor, in dissent, noted the involvement of the police in the identification process. She would have extended the Court's traditional review process to include unintentional as well as intentional suggestive conduct. n158 Justice Sotomayor stressed that the vast body of recent scientific literature reinforced the conclusion that the rule should be extended. n159

Perry, therefore, did not reach the issue that we wrestled with in Henderson: the vitality of the Manson test, in light of decades of scientific research, when the police have arranged an eyewitness identification. That issue will likely arise in the context of another, future case.

Conclusion

Eyewitness identifications relate directly to decisions about guilt or innocence. Their reliability, as we observed in Henderson, is central to "the very integrity of the criminal justice system and the courts' ability to conduct fair trials." n160

All of the parties interested in this debate - victims and defendants, prosecutors and defense counsel, investigators and judges, not to mention the public - share the same goals: to identify the right person and put that identification to a fair test. That goal is consistent with the core mission of the criminal justice system: to see "that guilt shall not escape or innocence suffer." n161 Hopefully, Henderson will help promote that aim.

Stephen Wilkinson, Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions (Geneva Academy of International Humanitarian Law and Human Rights, 2012), Section IV
SECTION IV: ANALYSIS

Having set out in general terms how the concept of a standard of proof is applied in traditional judicial mechanisms, and examined via different case studies how standards of proof or degrees of certainty appear to have been employed by recent FFM's and other relevant mechanisms, we now draw together the information gathered so far, suggest some best practices, and propose tentative recommendations for further discussion.

This section will:

- Examine the usefulness of standards of proof for the work of FFM's (1).
- Examine the expression of standards of proof in the reports (2).
- Summarise the ways in which standards of proof can be, and have been used (3).
- Present an argument for applying a balance of probabilities approach as a guiding standard (4).
- Suggest internal and external factors that may make it necessary to apply a higher or lower standard than the guiding standard (5).

1. Usefulness of standards of proof for the work of FFM's

Before we address what standards are appropriate for FFM's, we should, first, address the usefulness of applying such standards and, second, assess how such standards should be expressed.

How useful are standards of proof, applied as a threshold for making findings of fact with regard to legal and international norms, when such standards are transposed from their traditional judicial setting and applied in a more flexible, ad hoc, and quasi-judicial process?

Because FFM's are often mandated to determine whether or not international norms have been violated, the application of a standard of proof to their decisions appears to be logical and coherent. Having a minimum threshold of certainty for propositions alleging very serious acts, such as genocide, forced disappearance, killings or rape, appears appropriate. Yet the practical constraints that FFM's face - limited access to information, short time frames, lack of enforcement powers, sometimes an advocacy focus - may make some reticent to apply formal standards of proof to a very informal process.

It seems that the nature of the work demands a discussion of standards of proof, but that discussion should address the specific purposes of FFM's and must therefore take into account their inherent limitations when they scrutinize information in a non-judicial context.

**Basic Recommendation:** The application of a standard of proof should be a central methodological consideration before and during a FFM.

2. Expression of standards of proof in the reports

If we accept the basic premise that standards of proof (or degrees of certainty) are useful, we must address how such standards are to be expressed.

The first question is whether there should be an external or internal dynamic to these standards. The second is whether standards of proof need to be fixed, singular or varied. In judicial mechanisms, two general approaches to forming and applying a standard. The traditional common law approach is to define and apply the standard explicitly. The civil law approach has been to
arrive at a standard of proof based on a “number of unarticulated factors concerning the evidence that has been furnished” (internal).[302]

What approach should a truly international and less formal process take? Is it necessary to state standards of proof explicitly, or do internal standards serve the purpose of FFM better? Or is a case-by-case assessment to be preferred?

**a. External**

The common law approach has the merit of being transparent. It enhances credibility by enabling an external reader, victim or accused, to evaluate the veracity of the claims being made. This rigour can help to differentiate FFMs from more and less formalized processes. It can also facilitate any subsequent process, such as a judicial action, because the findings are based on clear criteria and as a result future investigators can assess the extent to which they may rely on the information, given their own standards of proof.

The recent controversy regarding the Goldstone Report (even though it applied an explicit standard) would seem to support the argument that the credibility of a report should derive from the strength and clarity of its methodology rather than from the reputation or personal standing of the Commissioners.

**b. Internal**

An internal approach was adopted, at least to some extent, by the DCI (in relation to its general approach), the YCE, and the LCI. The phrases they use to refer to standards of evidence are often negative in form. For example, it is said that the standards applied do not meet the standard of judicial scrutiny, but no positive formulation is advanced.

The best example of this approach is the recent Libya Commission of Inquiry (LCI). In reference to standards of proof, it variously “opted for a cautious approach”,[303] “consistently refer[ed] to the information obtained as being distinguishable from evidence that could be used in criminal proceedings, whether national or international”,[304] showed a clear preference for facts observed first hand,[305] and stated that the Commission would take into account all forms of information “notwithstanding their qualitative differences”. [306] Although we have some sense that the material was scrutinised, it is difficult to assess objectively the certainty of each of the Commission’s findings.

This is not to say that the internal process is less comprehensive. Even when standards of certainty are not clearly expressed, the Commissioners have extensive experience of working in previous fact-finding missions, or as criminal investigators, judges or prosecutors, and their ability to handle complex information and draw conclusions based on fact will usually be of a high order. A degree of scrutiny will be applied, even if its procedure and character are not declared. The omission of a clear definition regarding standards of proof may give Commissioners a margin of flexibility and discretion that may be particularly helpful for FFMs that want to reach a politically agreeable conclusion, or want to instigate future action, or that are severely handicapped due to restricted access or limited timeframe.

**Basic Recommendation:** FFM should state their methodological standards at the outset of their report.[307]

**c. Fixe/ Variable**

Standards of proof when externally expressed can be used in several ways.
i. *A singular overarching standard*

The application of one standard is set out at the beginning of the report and all findings must reach the threshold set. As a result, there are no apparent differences in the certainty of each determination.

Example: GFFM “assess[ed] whether in all circumstances there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact.”

ii. *Several overarching standards*

More than one standard of proof is set out at the beginning of the report. As a result, each finding must still reach a minimum standard but, if a finding surpasses this standard and attains a higher degree of certainty, this is reflected in a clear manner.

Example: UNCTES based its findings on three standards: sufficient, substantial, overwhelming.

In addition to overarching standards, either singular or multiple, descriptive expressions of certainty are always useful. A factual finding is expressed in a manner that reflects the certainty of the claim. Such approaches may be used alongside overarching standards or may replace them when no clear overarching methodological standards are feasible or adopted.

**Basic Recommendation:** The certainty of factual findings is rarely uniform and the reality is that an FFM will be more certain of some findings than others. Adopting a layered approach will add credibility to findings and enable FFMs to convey their findings more accurately. They will also avoid the risk of falsely appearing to attach one level of certainty to all their findings.

In this light, the UNCTES appears to provide an excellent framework for best practice.

![Graph showing standards of proof](image)

3. **Ways in which standards of proof can be, and have been used**

Having discussed the usefulness of standards and examined how standards should be expressed, the core question remains. What standards of proof are most appropriate to the work of FFMs?

*a. Overview*

In terms of the actual content of possible standards, three standards of proof are well accepted in a range of judicial processes: beyond a reasonable doubt; clear and convincing evidence; and a balance of
probabilities.

For the purposes of FFM, which are often preliminary and short term exercises, frequently constrained by poor quality of information, two less demanding standards may be considered: “one of the reasonable conclusions” and “reasonable suspicion”. These standards have been used when addressing the genocide charge on the arrest warrant of Omar Al Bashir, and in the British domestic system when issuing arrest warrants.

b. **Defining four standards for fact-finding**

To start with, although the terms “standard of proof” and “degrees of certainty” have been used interchangeably, the latter phrase seems to be more appropriate for a less formalized process such as fact-finding. Avoiding the phrase “standard of proof” will help to differentiate FFM processes from their more formal judicial cousins. On the same reasoning, the highest standard of “beyond reasonable doubt” should be replaced with “overwhelming evidence” because the “beyond reasonable doubt” standard is synonymous with the level of proof required for a common law criminal conviction, cannot realistically be attained outside a courtroom, and has a different character when applied by FFMs. The term “overwhelming evidence” appears to be more appropriate.

The four working standards and definitions are therefore:

- **Reasonable suspicion:** Grounds for suspicion that the incident in question occurred, but other conclusions are possible. (40%)*. Classic expression is: may be reasonable to conclude.
- **Balance of probabilities (sufficient evidence).** More evidence supports the finding than contradicts it. (51%). Classic expression is: reasonable to conclude.
- **Clear and convincing evidence.** Very solid support for the finding; significantly more evidence supports the finding and limited information suggests the contrary. (60%.) Classic expression is: it is clear that.
- **Overwhelming evidence.** Conclusive or highly convincing evidence supports the finding. (80%.) Classic expression is: it is overwhelming, it is undeniable.

*Numerical values have been added for guidance purposes only.

4. **Balance of probabilities approach (sufficient evidence) as a guiding standard**

FFMs include an array of *ad hoc*, highly politicized, and diverse mechanisms. When it comes to recommending the degree of certainty that FFMs should aim for in practice, commentary and discussions with those who have experience of them suggest that “balance of probability” (often expressed as “reasonable to conclude” or “sufficiency”) is the best starting point.

a. **Limited Nature of Fact Finding**

It must be remembered that fact-finding remains a limited legal mechanism, usually having no capacity for enforcement, which examines extremely serious and egregious behaviour. It is therefore important to understand what FFMs can and cannot do. They often have a limited and restricted mandate, work under strict time constraints, have no powers of enforcement, and are not in a position to apply the same levels of scrutiny to their findings that would be expected of formal judicial processes. In this light, the recommended standard would be simple balance of probability; or, put simply, “is there more evidence to support a finding than not?” It would appear illogical to apply a higher starting point of certainty to a mechanism that is preliminary and often a tool of advocacy.
b. Reflected by practice

Such an approach is logical, and is supported by available literature on the topic. It also finds support from practitioners who were asked to consider this issue during the research. To paraphrase conversations with those involved with the Darfur Commission, to apply a standard higher than balance of probability is simply not coherent, because “beyond reasonable doubt” (and even prima facie case) is a standard that requires judicial scrutiny, which FFMs lack. Furthermore, the standard can easily be communicated to FFM members, who are simply required to decide whether a given violation was more likely to have been committed than not.

Of the case studies assessed it can be said that in general terms at least seven of the nine used such a standard. (The two exceptions were the IFFMCG and LCI, which applied a lower standard.)

c. Nature of the behaviour being investigated

While, in general terms, using a balance of probabilities standard appears to be credible for a non-judicial process, FFMs that examine grave violations of human rights and international humanitarian law may need to adopt a higher standard, given the seriousness of the acts and the consequences that may flow from their judgements. An analogous debate occurred with regard to international tribunals. It was asked whether such international judicial mechanisms need to take a different approach to the application of standards (or their interpretation), compared with domestic courts, because of the nature of the behaviour they judge - behaviour that is internationally repudiated and occurs in an environment of lawlessness.

Domestic crimes prove exceptions to the norm of lawfulness; international crimes, by contrast, take place in a context in which violence is so widespread, officially approved, and socially accepted that it cannot be considered deviant…In such a context- where so many are guilty- heightened concern about preventing the wrongful conviction of innocents that a particularly stringent conception of the beyond a reasonable doubt standard instantiates may not be necessary.[308] Combs is not suggesting “we convict on the basis of speculations”. She suggests, “the factual context surrounding the crimes ... may inform our views about how much doubt is tolerable”. The factual context for FFM is often similar if not identical to situations that have merited international criminal action. The nature and context of situations may shift our underlying assumption, with regard to criminal trial, that convicting the innocent is more costly than acquitting the guilty. In this criminal context:

“It may not be as costly to wrongfully convict a defendant of one crime when there is a non trivial likelihood that he is guilty of another crime than it is to wrongfully convict a defendant, who if he did not commit the crime for which he has been charged, is entirely innocent”.

Although these issues are clearly discussed in the context of international criminal trials, the theoretical basis for applying standards can be transferred to fact-finding. The consequences of failing to report on abuses of human rights and humanitarian law must be of equal and possibly at times of more concern, than occasional inaccurate accusations of illegal behaviour.

The latter can be tolerated, to the extent that fact-finding remains a limited mechanism that is often subject to obstruction and lack of cooperation by states, and where the harmful consequences of inaccurate statements amount to misinformation. In the violent environments that FFMs investigate, this harm is unlikely to outweigh the value of conveying information pertinent to assessing the human rights situation.
d. Need for credibility

A balance of probabilities approach is therefore realistic; it can also provide credibility and accuracy. Any argument for using a lower standard as a general standard for FFMs, such as “reasonable suspicion”, may cause FFMs to report all allegations that they suspect have occurred, reducing the rigour of the process and levels of scrutiny. This would not be appropriate for high profile inquiry mechanisms that examine very serious violations. FFM findings must be considered to have some certainty, and FFMs must avoid speculative accusations. Setting “one of the reasonable conclusions” or “reasonable suspicion” as a general standard would therefore appear to be problematic.

Basic Recommendation. Balance of probabilities is a coherent starting point for the application of a set standard of proof.

4. Internal and External Factors that may make it necessary to apply a variation (higher or lower) standard than the guiding standard

While the balance of probabilities standard appears to be an appropriate guiding standard (which would certainly benefit from further discussion with leading experts), it would be superficial to say that this standard is necessarily appropriate in all circumstances. FFMs undoubtedly need to address many issues and factors that will require them to reflect on the appropriateness of a balance of probabilities standard. In particular, they might need to apply a lower or higher standard of proof in order to fulfil certain mandated activities or manage specific circumstances associated with their mission.

![Diagram]

**a. Importance of the norms being investigated**

The FFMs deployed to various emergency situations across the world, from Darfur and El Salvador to Libya and Israel, have had to investigate some of the most egregious behaviour in human society, often assessing situations where hundreds and at times thousands of people have been killed, abused, torture, raped, and ultimately denied their most basic rights. The seriousness of the behaviour that FFMs investigate is not in question. Yet an argument can be made, not least by FFMs themselves, that some norms of international law carry with them an extra degree of stigma and may require a differentiated approach. In such cases, a balance of probabilities standard may be inadequate. Both genocide and torture might fall into this category.
A hierarchy of serious human rights violations may not be universally acceptable; yet there is a degree of coherence in saying that, when dealing with the most serious abuses, an extra degree of rigour is appropriate. The International Court of Justice, for example, applies different standards according to the seriousness of the violation it examines. [309]

On further scrutiny, however, this argument becomes far from straightforward. Indeed, a case can be made that, the examination of very grave violations may requires a lower level of scrutiny, because it may be more important to show that a state committed very serious violations (at some risk of error), if the consequence of applying high standards of proof will be that an FFM is unable to bring to light evidence of genocide or torture. The gravity of the behaviour under review means that a high standard of proof is required if the interest of those accused is the primary consideration; it requires a lower standard, if the interests of victims are the primary concern.

FFMs may also need to take special care when they address behaviour that certain societies particularly stigmatize. A possible example is provided by the OHCHR Mapping Report, which caused an outcry when it suggested that forces under the control of the Patriotic Front of Rwanda (RPF) may have committed acts of genocide against the Hutu population. The dilemma in such a situation is to weigh up the natural sensitivities of victims, the rights of those accused of crimes, the broader political sensitivities and the duty to report all cases of serious human rights violations.

**Recommendation.** It may be important to give certain norms specific consideration when assessing the appropriate standard of proof. The approach taken may be influenced by the nature of the mandating body, and by specific historical, cultural or political sensitivities relating to the norm.

**b. Single instances, patterns and policy**

The time and logistical constraints placed on each FFM normally mean that FFMs seek to identify patterns of behaviour rather than scrutinize single instances of concern (although the finding of a pattern can only be based upon the establishment of several single instances). In itself, this does not appear to have significant implications for standards of proof, though it strengthens the claim that a lower standard (such as balance of probability) is more appropriate, because FFMs will often draw on individual cases to illustrate broader trends. Consequently, the level of scrutiny they require is lower than in judicial cases when each instance or situation is assessed individually.

When FFMs come to decide whether a pattern of behaviour represents a policy of a group or institution, the legal and political implications can be extremely important and may require a discussion of standards of proof that raises many of the issues considered above, with regard to very grave violations.

It may be relatively easy to establish that soldiers of State X violated international norms, and that State X is therefore responsible, but much harder to show that such incidents represent a policy or a consistent intention to commit the violations in question. Such a claim must be seen as an aggravated charge, and a case can therefore be made for applying a higher standard of certainty to such a determination.

If claims that violations are a matter of policy should be subject to higher standards of proof, fact finders will need to avoid some of the pitfalls made by previous fact-finding bodies. The most important question is a simple one. Is it legally relevant to assert that the violations in question were committed as a matter of policy? If the policy aspect is significant for the legal determination (as with a crime against humanity, for example), then a balance of probabilities approach may remain appropriate, because it is inherent to the legal assessment. In other cases, however, it may be argued that, due to the
sensitivities involved, and also the added gravity of asserting intentionality, a higher evidence standard may be desirable. The risk is that, otherwise, the FFM may be adjudged to have made a political statement rather than adopted objective legal positions.

**Recommendation.** When assessing whether violations reflect a policy of unlawful behaviour, FFMs should first ask whether or not such a judgement is necessary to their legal findings. If so, a balance of probabilities standard may remain sufficient. If not, a higher standard may be more appropriate.

c. **Attribution**

i. **Groups**

From this research, it does not appear that judgements with regard to the behaviour of states or groups demand a specific or different approach. Although it may be challenging to attribute responsibility for violations to a group (and though in many ways this may be the central question to answer), it remains integral to the legal assessment. However controversial or complicated the assessment is, the interests involved do not appear to demand a separate approach; there is no rational reason to do so merely because the group responsible is a state or a non-state entity. This said, depending on the situation and the issues at stake, it may be appropriate to apply some form of sliding scale.

**Recommendation.** Only very occasionally, when attribution is particularly problematic, should FFMs consider increasing the degree of certainty above a general balance of probability standard.

ii. **Identifying Individuals**

The identification of individuals involved in the commission of violations is one of the most controversial and challenging aspects facing modern FFMs. It is an aspect of fact-finding that clearly resembles more formalized criminal processes. Identifying individuals is an essential aspect of the process of truth telling and fact-finding. Victims and the wider community have a right to know who was responsible for atrocities. However, the process of identifying individuals via a relatively informal process such as fact-finding naturally raises concerns regarding the rights of those who are alleged to be responsible. The risks of making an erroneous determination, or naming an individual on weak grounds, are evident, and doing so has clear implications for the person’s liberty and interests, especially when the alleged crime is a grave one. A wide range of issues arise, from fair trial rights to personal safety. While it is undoubtedly important to protect individuals from being erroneously labelled as murders, torturers, war criminals, genocidaires, etc., however, does this mean that FFMs should apply a higher standard of proof when they identify individuals, than when they attribute responsibility to states or groups?

A key point to make is that individuals can only ever be suspected of committing crimes. To state with certainty would naturally involve a criminal process. The naming of individuals involved in state violations must therefore be distinguished from attribution of criminal responsibility, since the latter can only be established by means of a criminal process. While FFMs may certainly make determinations regarding the involvement of individuals, therefore, their statements are naturally circumspect with regard to actual guilt. In practice this means that FFMs will employ terms such as “reasonable to suspect” when they refer to individuals, and “reasonable to conclude” when they refer to states. Both phrases use the same threshold or standard, but the frameworks involved are different: one being criminal in nature, the other civil.

We face here an interesting conundrum. On one hand, the interests involved are more serious and therefore the standards of proof may need to be raised. On the other hand, attributing criminal
responsibility outside of a formal criminal process is necessarily more difficult and hence individuals
can only ever be suspected of committing a crime and hence the standard of certainty is inherently
lower due to the nature of the normative framework.

The identification of individuals was as the heart of the work undertaken by the Darfur and Guinea
Commissions. The standard applied by the DCI “require[d] a reliable body of material consistent with other
verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime”. The Guinea Commission used a similar approach: “verified evidence assembled to demonstrate that a person may reasonably be suspected of having participated in the commission of a crime”. However, the Guinea Commission differed from the Darfur Commission in two fundamental ways. First, it applied a range of descriptive standards to assess the certainty of the involvement of different individuals, from “may have been involved” to “a prima facie” case. Second, it made public the list of individuals named.

How should the publication of such information be handled? If names are published, should a higher
standard of proof be adopted? It can be certainly be argued that the interests at stake are such that the
evidence should be clear and convincing. FFMs may also deal with this problem as the Darfur report
chose to do, by naming individuals but not releasing the list of those named directly into the public
domain.

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<th>Balance of Probability (reasonable grounds for suspicion) or lower</th>
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<td>Identifying Individuals</td>
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<td>When decisions are made about whether or not to release individual names publicly, the experience and practice of truth and reconciliation processes can be useful. They seem to provide an excellent good practice guide for fact-finders to follow:</td>
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“There may be a range of legitimate reasons for not naming names: security risks for commissioners, victims or witnesses, a lack of sufficient evidence, or an inability to give proper notice or safeguards for those accused. If a commission decides not to name perpetrators, it should at least set out reasons that are politically, morally and legally defensible. Where it does name names, it must clearly state that its findings do not amount to a finding of legal or criminal guilt.”[310]

**Basic Recommendation:** When individuals are to be identified, a clear standard of proof should be applied. Balance of probability remains an appropriate standard as a starting point but, if a decision is made to list those involved publicly, greater scrutiny may be appropriate. While the involvement of an individual may be determined, individuals can only ever be suspected of committing a crime.
d. Mandating authority: interests and audience

Fact-Finding usually cannot transpire in a political vacuum; fact finders must take into account the prevalent socio-political commitments of the organ sponsoring their inquiry.[311]

The mandating body and its socio-political commitments will necessarily have an influence on the choice of standard of proof. The institution, its reputation, its constituency and priorities, will all influence the standard of certainty adopted when pronouncing on human rights or humanitarian law violations. Some institutions, for example, will prioritise engagement (Geneva Call), others resolution of a diplomatic crisis (Palmer Report[312]) or peace and security (UNSC, UNSG, IFFMCG) over borderline judgements on humanitarian norms. As a result, they are likely to comment only on violations that have demonstrably occurred. By contrast, human rights advocacy organisations (HRC, HRW, AI) may feel it is appropriate to report cases where there is a reasonable suspicion that human rights norms have been violated.

Additionally there may be a desire, motivated by a misunderstanding of impartiality to find violations on both sides, and hence this may skew the standard of proof applied.

**Recommendation:** The nature of the mandating authority may mean that certain interests are placed above others. However, any FFM mandated to assess violations of humanitarian or human rights law should primarily assess such violations as they find them. A failure to report behaviour (for example, as a result of applying an exaggeratedly demanding standard of proof or deliberately avoiding clear determinations), even for honourable reasons, may delegitimize the fact-finding process as well as the sponsoring institution and is an affront to victims of abuse. In the same manner, FFMs should ensure that their findings are credible and reliable; lower standards of proof should therefore be accepted only in limited circumstances. Any desire to establish violations of all parties involved should be only done with clear reference to the certainty of the assertion and hence should be framed against objective standards of proof.

e. Output, Consequences and Interrelationship with other Transitional Justice Mechanisms

While no FFM can predict the future, certain consequences, likely or intended, may be worth considering when deciding on an appropriate standard of proof.

**Post Fact Finding**

→ National reform (Democratic, Truth Commission, other transitional justice processes)
→ Continuation of Ffm/ICI
→ Domestic or International Criminal Investigations
→ Civil Proceedings
→ Consensus Building
→ Increased International Scrutiny/Engagement
→ Impunity
→ Peace and Security (de) Stabilized
→ End /or Continuation of violations.

The direct or indirect impact of FFMs should not be downplayed. A brief review of the case studies shows that international inquiries, or the events they investigate, generate numerous forms of response.
They include democratic reform in Guinea, a referral to the ICC by the Security Council of the situation in Darfur that led to the indictment of a sitting head of state, and over 400 investigations by the Israeli government in reaction to the GFFM.

The question for our discussion is whether or not the standard of proof selected by a FFM should be adjusted upwards if it is foreseeable that its report will elicit significant reactions. Often the main job for a FFM is simply to put information in the public arena. For instance, why should referral of the situation in Libya to the ICC influence the LCI’s methodology? Are the consequences of the report completely separate considerations, unlinked from the LCI’s methods, or is there a relationship?

i. **Criminal Action**

FFMs increasingly consider the possibility of formal criminal action. The majority of the case studies examined here do so, not in terms of their findings (since FFMs state clearly that their conclusions do not imply criminal guilt), but in the way they identify individuals responsible for violations or frame their concluding statements, or recommend that criminal processes should be undertaken.

The record shows that FFMs have a rather varied and complex relationship to formal judicial processes. While the GFFM and Darfur Report have preceded criminal investigations (the former at domestic, the latter at international level), the El Salvador FFM triggered little judicial action despite its recommendations. Most recently, the Libya Commission of Inquiry was mandated a mere three days before the Security Council referred the situation to the ICC, and both the FFM and ICC investigators were subsequently in Libya simultaneously.

The FFM case studies highlighted output and consequences partly because, as noted, these may influence the standard of proof that is appropriate. The possibility of criminal action is obviously relevant because standards of proof are central to criminal processes, and have been derived from them. A further question here is whether applying criminal methodologies is useful or feasible.

For now it can be stated that the processes remain separate and FFM do not have to adhere to the same level of scrutiny in comparison with their work as a criminal investigator who have to consider the admissibility of the information they collect. Nevertheless, it can still be asked whether knowledge that criminal investigations are taking place or might do so, or the certainty that they will not occur, should affect the choice of standard of proof.

**Scenario 1: Concurrent or possible future criminal investigations**

**Argument for a higher degree of certainty**: knowing that criminal investigations have started, a FFM that seeks to be relevant must, to the extent possible, apply the highest standard of proof possible to its work, to the scrutiny of information and to the certainty of its findings, in order to facilitate use of its investigation and information by the criminal courts. Where it has access to individuals and materials that the criminal authorities are unaware of or unable to access, or where it is possibly the sole source of information, a FFM should use standards appropriate to criminal investigation for processing information. Evidently, if a FFM makes accusations that are subsequently repudiated in a court process, this will undermine the credibility of the FFM.

**Argument for a lower degree of certainty**: Frequently, only a small proportion of the many incidents that occur during an armed conflict or emergency are subject to criminal investigation. While FFMs should be open to sharing their information, they remain separate processes and should apply separate
rules. Indeed, where more formal processes are undertaken, FFMs are under less pressure and can be less cautious. FFMs should not be afraid of having their findings overturned or disproved in a formal criminal process, because the occurrence of a criminal prosecution demonstrates the presence of a prima facie case; a criminal prosecution based on an event detailed in a FFM is a success for the FFM. Whether or not criminal guilt is established, or criminal investigation brings new facts to light is not the point: the task of FFMs is to make the best evaluation possible based on the information that is available at the time.

Scenario 2: No future investigation or accountability

Argument for a higher degree of certainty: If prosecution and other accountability mechanism are likely to be frustrated, the FFM will become the only, or one of few, authoritative records of the events that occurred. Both its methodology and standards of proof should therefore be rigorous, to ensure that its findings are robust. It should reference only those violations that certainly occurred.

Argument for a lower degree of certainty: If no individuals are likely to face prosecution for serious violations of human rights, this demonstrates that the government (or organization in control) does not take human rights abuses seriously. It should not be rewarded for this stance and FFMs should therefore assemble the fullest information possible, including incidents that certainly occurred and incidents that are suspected to have occurred. The role of FFMs is to promote, strengthen and protect human rights and they do victims a disservice if they apply standards of proof that prevent the disclosure of abusive behaviour.

i. Broader Impact

In addition to being a possible trigger for criminal action, FFM findings may have a range of impacts that may be positive or negative. Negatively, they may cause disengagement from a peace process, the withdrawal of peacekeepers, an increase in tension, or further conflict. Positively, they may lead to democratic reform (see Guinea), prevent ongoing violations, increase political engagement by conflicting parties, and the creation of transitional justice mechanisms.

iii. Ongoing violations and the insertion of a fact finding mission

In the light of the fact that two recent commissions of inquiry (Libya and Syria) have been undertaken at a time when on-going abuses are taking place, it is worth assessing the role such missions can and should play in halting on-going atrocities. In the traditional sense, inquiries are undertaken ex post in response to an event or series of events that have taken place. However, with the Libya and Syria Commissions, engaging in their work at a point when the violations are on-going, FFMs may in fact play a crucial preventative role in such situations.

Investigation

ng within a situation where violations and even armed conflict is taking place naturally increases the challenges of making clear determinations, with many aspects of the FFM made more challenging such as logistics, ensuring victim protection, obtaining access to the country, regions or areas of concern, people, victims etc, all of which to some extent will feed into reducing information flow and hence the overall certainty of the findings made. Yet if the main rationale for the mission is to bring a halt to on going violence, then clear determinations are by no means a clear prerequisite, and if may well be very appropriate for standards of certainty to be lower.
Recommendation. Some consideration should be given to the possible consequences of the FFM Report. If a positive impact is likely to result from the findings, or is indeed a central rationale (such as halting ongoing atrocities) then a lower standard may possibly be tolerated.\[313]\) If the likelihood is strong that certain findings will have a negative impact, on the other hand, a clear and convincing standard may be more suitable.

\textit{f. Contestability of facts and level of engagement with parties under investigation}

A serious discussion of standards of proof must take into account the practical hurdles that many FFM\(_s\) face: lack of cooperation, lack of access, lack of security, hostility, and deliberate deception. Even if a high standard of proof is desired, these practical realities may make it impossible to achieve. If a FFM is able to engage and cooperate with the accused state or party under investigation, the conditions of investigation will naturally improve and findings are likely to be more certain. The opposite will be true when relations are poor or break down. On many occasions, FFM\(_s\) should be allowed have to make adverse inferences where parties or individuals refuse to provide relevant requested information and hence such refusal or silence, may be taken as a suggestion that wrongdoing occurred.
**Recommendation:** FFMs should give consideration to the level of cooperation that can be expected from the parties under investigation. The more they are open and receptive, the more likely it is that the FFM can apply a clear and convincing standard of proof. (This does not imply that such a standard *should* be adopted.) When the parties under investigation are not open and receptive, it is likely that some findings will only ever reach the standard of “one of the reasonable conclusions”. The FFM may need to rely on adverse inferences.
Nancy Amoury Combs, Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials


Introduction

After decades of inactivity, international criminal law has lately emerged as one of the most rapidly developing and influential subjects of international law and global politics. Sixty years after Nazi offenders were prosecuted at Nuremberg, the international community established an international criminal tribunal to prosecute those responsible for international crimes in the former Yugoslavia (ICTY). The ICTY spawned a number of progeny, including the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Panels in the Dili District Court in East Timor (Special Panels), the Extraordinary Chambers in the Courts of Cambodia, and, most importantly, a permanent International Criminal Court (ICC). The establishment of these institutions constitutes, in Mark Drumbl's words, "one of the more extensive waves of institution-building in modern international relations." n1

Most international law scholars warmly greeted the establishment of these tribunals. n2 Although large-scale atrocities have been committed since the dawn of humanity, for most of human history these atrocities have not elicited criminal sanctions. So, the move to impose accountability on brutal dictators who were responsible for widespread death, suffering and destruction was considered a tremendous advance, and early commentators credited international criminal prosecutions with advancing a host of praise-worthy purposes. International criminal prosecutions were said to affirm the rule of law in previously lawless societies, n3 to promote peace-building and transition [**237] to democracy in war-torn lands, n4 to assist in reconciling former enemies, n5 to deter future megalomaniacs from committing similar crimes, n6 to create a historical record of the conflict, n7 and to diminish the victims' propensity to blame collectively all those in the offenders' group. n8 International criminal justice was, in sum, the subject of a great deal of soaring and inspirational rhetoric.

In recent years, the glow surrounding international criminal justice has begun to fade. The scandalous cost of international criminal trials has driven some critiques, while inadequate outreach efforts have formed the basis for others. n9 On a much broader scale, Larry May, in his trilogy on crimes [**238] against humanity, war crimes and aggression, n10 has carefully scrutinized and explicated the normative foundations of international criminal law, rejecting much that does not conform to his moral minimalist account. Other scholars have begun questioning the ability of international criminal tribunals to achieve many of the goals that previously had been reflexively attributed to them. Thus, whereas early commentators unquestioningly assumed that international criminal prosecutions would serve to deter the next generation of genocidal maniacs, more recently scholars have questioned that assumption. n11 Recent empirical research also has called into question the ability of international criminal tribunals to advance reconciliation and peace-building efforts following large-scale violence. n12 And Mark Drumbl, for his part, has offered a comprehensive and sophisticated critique of international criminal justice, concluding that there
exists a palpable disconnect between the effects of sentencing and the penological theories that are expected to justify the imposition of criminal punishment. n13

These are impressive studies because they scrutinize many of the foundational beliefs that drove the establishment of the international criminal tribunals. However, as impressive as they are, they assume the question that forms the basis for my work. The scholars I have mentioned might question whether the prosecution of certain international crimes can be justified given their infringement on state sovereignty. n14 or they might conclude that international criminal trials impair the prospects for reconciliation rather than advance them, n15 but their critiques presuppose that international trials - even if [*239] they can do nothing else - can determine with some measure of certainty whether or not a defendant engaged in the acts alleged in the indictment. n16 That is, even if international trials have uncertain philosophical foundations, even if they regularly fail to deter, rehabilitate or reconcile, international criminal trials have at least been considered useful mechanisms for determining who did what to whom during a mass atrocity.

It is that assumption that I will challenge. This article summarizes the research and conclusions that appear in my forthcoming book Factfinding Without Facts: The Uncertain Evidentiary Foundations for International Criminal Convictions (forthcoming 2010, Cambridge University Press). My research reveals that international criminal trials confront severe impediments to accurate fact-finding, impediments that should give rise to serious doubt about the accuracy of the Trial Chambers' factual determinations. The basis for my study is a large-scale review of transcripts from the ICTR, the SCSL and the Special Panels. From this review, I conclude that much eyewitness testimony at the international tribunals is of highly questionable reliability. In particular, many international witnesses are unable to convey the information that court personnel expect - and need - to receive, if they are to have confidence in the factual determinations they make. Sometimes, witnesses claim not to know the sought-after information, while in other instances, the communication breaks down as a result of the questioning process. Moreover, what clear information is provided during witness testimony often is inconsistent with the information that the witness previously provided in a pre-trial statement. Section I will summarize my findings regarding these testimonial deficiencies, findings that appear in Chapters Two and Four of my book. Section II will summarize Chapter Three of the book by canvassing some of the causes of the deficiencies. Section II reports, for instance, that many witnesses lack the education and life experiences to be able to read maps, tell time, or answer questions concerning distances and dates. Cultural norms and taboos create additional communication difficulties, as some witnesses are reluctant to speak directly or at all about certain events and as international judges may inappropriately assess witnesses' demeanor and willingness to answer questions by Western norms. The need for language interpretation for virtually every fact witness - sometimes [*240] through multiple interpreters - and the unfamiliarity of most witnesses with the predominantly adversarial trial procedures in use at the international tribunals only compound these problems.

My review does not encompass ICTY proceedings because the ICTY is an outlier amongst the Tribunals that have prosecuted international crimes and that will be doing so in the future. Although a cursory review of ICTY transcripts reveals that those proceedings do feature some of the problems that will be described in the following pages, because the ICTY prosecutes crimes that took place in Europe, the educational, cultural and linguistic divergences between witnesses and courtroom staff that so impair communication at the ICTR, the SCSL and the Special Panels do not prove as
distortive. That in itself, would not be reason to exclude the ICTY from my study, but the fact that the ICC is currently focused exclusively on African conflicts suggests that the fact-finding impediments that I have identified in ICTR, SCSL and Special Panels' proceedings constitute a continuing concern for international criminal justice despite the fact that the ICTY does not feature them in the same number or severity.

As a consequence of the fact-finding impediments that I will describe, the testimony of international witnesses often is vague, unclear and lacking in the information necessary for fact-finders to make reasoned factual assessments. As I noted, these deficiencies can be explained by the educational, cultural and linguistic factors referred to in Section II but they also can be explained by witness mendacity. Indeed, many of the testimonial difficulties canvassed in Section I - from the failure to answer questions of date, time and distance to the circuitous responses that so lengthen and complicate communication - could also stem from a witness's desire to evade. Although every criminal justice system in the world has its share of lying witnesses, Section II reports that ICTR and the SCSL have more than their share. The group-based loyalty and ethnic divisions that gave rise to the international crimes in the first place can create powerful incentives to put enemies in prison, whether they belong there or not, and the international tribunals provide additional incentives - perhaps unwittingly - through the financial assistance that they provide to testifying witnesses. Whatever the causes of the false testimony, Section II reveals that some international criminal tribunals hear a lot of it. Indeed, my review of ICTR cases shows that more than 90 percent of them featured an alibi or another example of diametrically opposing testimony from defense and prosecution witnesses. Although some of these witnesses may be honestly mistaken, the use of alibis and the incidence of contradictory testimony so vastly exceeds that which is common to domestic trials that it would seem naive to dismiss a substantial [*241] portion of it as arising from honest mistakes.

Section III will summarize the final five Chapters of my book by exploring the conceptual and normative implications of the aforementioned testimonial deficiencies.

I. Testimonial Deficiencies

International criminal trials employ Western-style criminal procedures that presuppose a smooth flow of questions and answers between counsel and witnesses. In particular, it is expected that in response to counsel's questioning, eyewitnesses will convey the details of the events they witnessed in a form that the fact-finder can both understand and critically evaluate. To be sure, clear communication between witnesses and fact-finders is not always realized even in domestic cases. Trials involving medical malpractice, products liability and patent claims - to provide only a few examples - frequently feature testimony about scientific or technological issues that are difficult for witnesses to clearly explain and for fact-finders to satisfactorily grasp. But the ordinary domestic criminal trial rarely presents these problems. Eyewitnesses have a story to tell about certain events relevant to the defendant's criminal culpability and, through questioning, they are able to tell that story in a way that is not only comprehensible to the fact-finder but provides the fact-finder sufficient information to draw reasonable conclusions about the defendant's liability. Witnesses in domestic criminal trials may not answer questions accurately, but they do answer the questions and they do answer them intelligibly.
The same is frequently not the case at the ICTR, SCSL and Special Panels. Indeed, the smooth flow of questions and answers that is the norm in the domestic criminal trial often is unattainable at those tribunals. As my book describes in considerably greater detail, international witnesses frequently are unable or unwilling to relate whole categories of information that are crucial to accurate fact-finding. Sometimes, witnesses claim not to know the sought-after information, while at other times, the difficulties seem to stem from the mode of courtroom questioning. Some witnesses claim not to understand counsel's questions, for instance, while others respond evasively or otherwise unresponsively, and still others testify in a manner that is almost entirely unintelligible to courtroom personnel. Make no mistake: many of these difficulties stem from factors beyond the witnesses' control. Indeed, as I just noted, Section II will consider various educational, cultural and linguistic explanations for the testimonial deficiencies. But whatever their causes, these difficulties create tremendous uncertainty about even the [*242] most basic aspects of the criminal activities at issue in international trials.

To begin, international witnesses often have difficulty answering basic questions that are asked of them. So, for instance, with some notable exceptions, international witnesses have trouble providing the dates of the events that they witnessed. n17 Sometimes a witness will be able to say that the event in question occurred during the dry season or the rainy season, n18 or better [*243] yet, during a particular month; n19 but that is often about as precise as the dating gets, and many witnesses cannot provide even that much information. n20 Failing to specify when particular events occurred substantially impairs the Tribunal's ability to find facts. The failure to date events can conceal inconsistencies between witness accounts that would otherwise come to light. More importantly, it prevents the defendant from presenting an alibi in defense. We all recognize that it is a more compelling defense to assert: "I did not make a speech calling for the extermination of the Tutsi at a rally in Cyangugu on February 12, 1994, and I can prove it because I was attending a meeting of government ministers in Kigali on that day," than it is to say, "I did not make a speech calling for the extermination of the Tutsi at a rally in Cyangugu." But the fact that the defendant was at a meeting in Kigali on February 12, 1994 means nothing if the witness can say only that the rally occurred sometime during the rainy season.

International witnesses also frequently have difficulty estimating distances. Some witnesses assert that they do not know the lengths of Western units of measurement, such as miles or kilometers. n21 Sometimes witnesses try to estimate when they are not really able. Asked how wide a road was, one Timorese witness responded "maybe 100 meters wide." He went on to [*244] testify that it was wide enough for one car to fit. n22 And a Sierra Leonean witness insisted that he walked 12 miles in 45 minutes even after it was pointed out to him that it would be hard to drive the distance in that amount of time, let alone to walk it. n23 Accurate answers to distance questions are of key importance to fact-finders. How much weight a Trial Chamber can justifiably place on a witness's identification of a defendant at a particular scene will depend in large part on how far the witness was from the defendant. A Trial Chamber that hears only that "the distance was not great" is making factual findings in the dark.

Duration estimates n24 and numerical estimates n25 also frequently prove [*245] problematic. So, for instance, witnesses have difficulty saying how long a particular attack lasted or how many attackers participated. And sometimes counsel try to elucidate or test a witness's account by means of maps, photographs, sketches and other two-dimensional representations, but the witnesses often
cannot make sense out of them. n26 Defense counsel show witnesses these representations to see if the witness was even present at the site, but if the witness says she cannot understand the picture, then there is no way to tell if she was there or not. Even if the Trial Chamber is sure that the witness was there, it might wish to pinpoint her exact location in order to assess the weight to give to her testimony. One ICTR witness, for instance, was able to point out her position on a photograph of a stadium, and because she was able to do so, the Trial Chamber was able to determine that she would have had a hard time identifying anyone located where the witness said the defendant was located.

n27

In the foregoing examples, witnesses did not answer questions because they claimed not to know the answers to those questions. But sometimes questions go unanswered because witnesses do not understand the questions they are asked or the Western court personnel do not understand the answers that they receive. Sometimes the witness will not understand the terminology used in the question, n28 and other times it is the form of the question that[*246] gives rise to the difficulties. Compound questions have proven especially problematic, and judges at the international tribunals have frequently had to remind counsel to divide up their questions into smaller, more intelligible parts. So, for instance, one witness could not answer the following question: "when ... the Kamajors told you that Chief Norman was coming to talk to them were you eager to go and hear Chief Norman?" Consequently, one of the judges reformulated the question into the following series of questions:

President: You know [Chief Norman] very well, huh?...
Witness: Yes, sir.
President: Right. He is your chief?
Witness: Yes, sir.
President: He was coming to hold a meeting with you.
Witness: Yes, sir.
President: Were you happy to go to the meeting?
Witness: Yes, I was glad. n29

In other cases, it is not entirely clear what the problem is, but it is clear that there is some problem because the witness's answer will not in any way match counsel's question. n30 In other cases, the confusion - or some sort of communication difficulty - will become apparent because counsel must ask a question multiple times in order to get a responsive answer from the witness. n31 And it is not infrequent that counsel never gets a pertinent answer as [*247] witnesses frequently seem to talk around the relevant topics.

A final problem concerns testimony that is inconsistent with previous statements. Investigators interview witnesses before they come to court, and they draft written statements ostensibly containing the information that the witnesses conveyed to them. The problem is that a substantial proportion of witnesses testify inconsistently with their written statements or with their in-court testimony in previous cases. While some of these inconsistencies are trivial, many are not. As my book reveals, the inconsistencies cover a wide range of information. Discrepancies are particularly apt to appear in testimony that concerns dates, distance, duration, numerical estimations and the other sorts of key details that international witnesses have such trouble providing. n32 In other cases, the inconsistencies relate to the specific facts of the [*248] crime n33 and sometimes pertain
to fundamental aspects of the witness's account. To provide just one of many examples, AFRC witness TF1-209's statement said that she fled with her 2-year old son but later lost him and has never seen him again. She testified, by contrast, that her son was 6 and that he was shot and killed in her presence. n34

If discrepancies about the crimes themselves were not worrisome enough, witnesses also frequently testify inconsistently about the defendant's involvement in the crime. Sometimes the witness's testimony will inculpate the defendant when the statement did not. n35 Akayesu witness Karangwa testified, for instance, that the defendant shot and killed all three of Karangwa's brothers, but his statement says that the defendant shot and killed one of the witness's brothers but that the other two were killed by machete by men who were with the defendant. n36 Sometimes, by contrast, the later testimony seeks to exculpate, not inculpate. n37 Most worryingly of all perhaps, witnesses sometimes testify about the defendant's key involvement in the crime, even though the witness's statement, which may feature a detailed description of the crime and surrounding scenes, fails even to mention the defendant. n38

These sorts of inconsistencies would be troubling enough if they happened only occasionally. Again, more details are provided in the book, but suffice it here to say that in reviewing the transcripts of all of the SCSL cases and a handful of ICTR cases, I found that on average, approximately 50 percent of the witnesses testified seriously inconsistently with their past statements. n39 I recognize that my assessment of seriousness is subjective, but I have little doubt that the inconsistencies that I considered serious (and indeed plenty of those that I did not so consider) are sufficiently grave that they would substantially impair the credibility of the witness if he were appearing in a municipal court.

II. Causes of the Testimonial Deficiencies

Having summarily canvassed the impediments bedeviling international criminal trials, I will now briefly mention some of the causes of those impediments. The causes are of key significance because they affect the Trial Chambers assessment of the testimony.

Education: The most obvious factor contributing to many of the impediments is lack of education and life experiences. A large percentage of the witnesses appearing at the international tribunals are illiterate and have had no or virtually no formal education. Thus, many of these witnesses not only do not know how to read and write but also have never been taught to tell time, or to measure, for instance. It consequently should come as no surprise when these witnesses are unable to answer many of the questions put to them.

Culture: Cultural differences between the witnesses and Western court personnel also prove an additional impediment to accurate fact-finding. Indeed, an inability to answer certain questions may be driven less by educational factors than by cultural factors. Anthropologist James Littlejohn's research, for instance, suggests that Sierra Leonean and Western notions of space differ radically. Littlejohn determined that the Temne people (who make up the largest tribe in Sierra Leone) do not view space as either "arithmetically measured [nor] geometrically analysed" but instead break it up into units such as "a day's journey," or for shorter distances, "the earshot." Littlejohn observes that although Westerners have become so accustomed to organizing space through geometrical analysis...
and arithmetical measurements that it has come to seem the natural thing to do, Temne space is ordered otherwise. "The size of a farm for example is arrived at by estimating the number of bags of rice it ought to produce, ... [and] when men hire themselves out to hoe for a farmer, the farmer and the labourer agree on an area which the labourer should complete in a day's work. The day's work, however, consists of completing the area." n40 In addition, many cultures do not attach particular importance to such objective units of measure, and one sees that play out at the international tribunals under study as well. International witnesses frequently express impatience when questioned on such details, and some make clear that they consider it of little importance to provide truly accurate answers. Rwandan Witness J, for instance, testified that the man who raped her remained on top of her for four hours. When an ICTR judge expressed skepticism that it was actually four hours, Witness J said: "For me, it was about four hours or maybe one year because the suffering was too much." n41 Similarly, Sierra Leonean witness TF1-012 initially testified that a certain rebel returned after "a week." When the witness later suggested that the rebel returned after several weeks, counsel pointed out the inconsistency. TF1-012 replied off-handedly, "we are native people, that which is not up to a month, we call it week [sic]." n42

Culture can also affect the style of answering questions. A linguistics expert testified in one of the ICTR cases that "it is a feature of the Rwandan [*253] culture that people are not always direct in answering questions, especially if the question is delicate." n43 That is certainly a useful piece of information for the Trial Chambers to have. Because Western speech patterns tend to be more direct, witnesses who provide indirect, circuitous answers are often thought at best to lack confidence in their perceptions and at worst to be deceptive. Such inferences are obviously not appropriate with respect to witnesses from certain cultures, but because the trial judges are not intimately familiar with the culture in question, they are left not knowing what speech signals or kinds of demeanor would legitimately give rise to concern.

Taboos can likewise prevent clear, forthright testimony. In the Los Palos case at the Special Panels, for instance, one of the defendants was questioned as to who had been on a bus during an ambush. After naming seven people, the prosecutor asked whether an individual named Harasio, who had subsequently been killed, had also been on the bus. The defendant refused to give a clear answer, and a frustrating exchange between the prosecutor and the defendant was ended only when East Timorese defense counsel informed the court of a "cultural tradition where you cannot mention dead people." n44

In this case, the taboo was identified, but international criminal transcripts feature so many confusing passages that one has to wonder whether unidentified taboos are getting in the way. And even when cultural divergences are identified, they can substantially impair the Trial Chamber's ability to assess credibility. For instance, Niyitegeka witness GGO said in his statement that a man named Kabanda was "captured and taken to Gitwa Hill" to certain leaders including defendant Niyitegeka. In court, however, GGO testified that he saw Kabanda being decapitated from his hiding spot in the pine forests of Kazirandimwe. The witness insisted that there was no discrepancy between his statement and the testimony, however, claiming that when he had said that Kabanda had been taken to the leaders on Gitwa Hill, he had meant that Kabanda's head had been taken. As he put it: "It was the head of the victim which was brought to the leaders, including Niyitigeka... When someone is decapitated and is emasculated, for us, it's the individual as a whole who has passed on, who has disappeared." n45 GGO's explanation may well have reflected Rwandan
cultural traditions, but judges who [*254] lack substantial familiarity with those will have little way of knowing.

Language Interpretation: The need for language interpretation only exacerbates the problems already mentioned. In some tribunals, witness testimony must proceed through multiple translations. In the Special Panels for instance, many questions were interpreted from English to Bahasa Indonesia to Bunak and then were interpreted back again when the witness answered. Similarly, the ICTR has few interpreters who can translate directly from Kinyarwanda to English, so interpreters typically interpret from Kinyarwanda to French and then from French to English. n46 Each translation increases the likelihood of mistakes, and while it is not always easy to determine when interpretation problems are occurring, sometimes witness answers are so unresponsive that one must suspect inaccurate interpretation.

Lying: The explanations just canvassed can be deemed "innocent." Although testimonial deficiencies caused by educational, cultural and linguistic factors may well impair the defendant's ability to present a defense, because vague, undetailed testimony is testimony that is less easy to rebut, these causes do not call the witness's credibility into question. If the witness has never learned to tell time, she won't know what time the crime occurred. If the witness's relevant cultural norms give rise to circuitous speech, the witness's testimony will seem evasive but in fact will not be. The problem is that many of these same phenomena can also be plausibly explained as purposeful efforts to conceal.

Indeed, the very fact that questioning at the international tribunals seems so frequently bedeviled by educational deficits, interpretation errors, and cultural divergences means that witnesses can invoke these communication impediments even when they are not at play, as a means of concealing lying, inconsistencies or other weaknesses in witness testimony. International witnesses who are falsely accusing a defendant may, for instance, find it most profitable to provide a vague account that is devoid of meaningful details. Dating events permits a defendant to contradict the witness's testimony, so it may prove a safer bet for the witness to claim that he does not know the relevant dates. Making distance and numerical estimates can likewise leave a witness vulnerable to contradiction, so they too are better left unstated. The same goes for the numerous examples of frustrating exchanges and unresponsive responses. While these may reflect a cultural proclivity toward circuitous [*255] answers and generally indirect speech, they may also reflect a witness's desire to evade the question at hand or at least to buy himself some time to consider the answer he wishes to give. It certainly seems to be the case that witnesses have more difficulty understanding questions that challenge their testimony or that highlight their potentially self-interested motivations. Indeed, more than one defense counsel has observed that witnesses frequently sail through direct examination but upon cross-examination become "non-understanding, non-educated." n47

There is no way to determine whether a particular testimonial problem results from perjury or one of the many innocent explanations, but I have been able to evaluate whether perjury seems in general to be a problem at the international tribunals, and I conclude that it is. Some witnesses outright admit that they lied in their testimony or in their written statements. n48 And sometimes the lying becomes apparent just through use of common sense. When one Sierra Leonean witness maintained that he was not acquainted with another witness and it later turned out that the other
witness was his [*256] son, we can feel confident that he was lying. n49 In another case, a Rwandan witness claimed that the defendant had killed her sister. It was revealed on cross-examination that this witness had testified in Rwandan courts that his sister had been killed by another person in a different part of Rwanda. When confronted with this inconsistency, the witness maintained that she had been testifying in the Rwandan courts about a different sister - both sisters, however, just happened to have the same Christian name. n50

Examples such as these abound, but even in cases where we do not have this kind of evidence of lying we would know that perjury is prevalent at the ICTR in particular because virtually every ICTR case has featured either an alibi or some other form of blatant contradiction between witnesses for the defense and for the prosecution. Reviewing ICTR transcripts and judgments, I found that 90 percent of the cases featured at least one example of diametrically opposed testimony between one or more witnesses. n51 [*257] [*258] [*259] Certainly, some of the instances of contradictory testimony probably reflect poor memory and perception, rather than perjury, but conflicting testimony is so prevalent in ICTR cases that it would be hard to dismiss all - or even a significant percentage of it - as the result of honest mistakes.

I have thus far shown that international tribunal testimony is deficient in many respects, and while there are many innocent factors that can plausibly explain these deficiencies, there also exist less-innocent explanations that are [*260] equally plausible. How much we need to worry about this state-of-affairs, however, depends on the overall nature and quantity of the evidence supporting the international criminal convictions.

Unfortunately, the news here is not good. Unlike at Nuremberg, where prosecutors submitted literally thousands of documents to the Tribunal, the evidence received by current international tribunals almost exclusively comes in the form of witness testimony. Further, many key facts in any given case are attested to by only one or two eyewitnesses. And finally, because most recent mass atrocities have taken place in oral societies, defense counsel have little ability to challenge the prosecutors' eyewitnesses except by presenting more eyewitnesses.

Indeed, unlike the Nuremberg Tribunal, which received from the prosecution reams of documents that proved beyond any shadow of a doubt the defendants' commission of certain acts, the ICTR, SCSL and Special Panels operate in a fact-finding fog of inconsistent, vague and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom. Perhaps Jean de Dieu Kamuhanda led an attack against the Tutsi at the Gikomero Parish Church, as alleged by the prosecution, but the only evidence that he did comes from alleged eyewitnesses, and the defense has a passel of its own witnesses who claim that Kamuhanda was with them, far from the massacre site. Perhaps Alex Tamba Brima was commander of the AFRC troops in the Kono district in May 1998, as the prosecution claims, but he and defense witnesses maintain that he was in RUF custody at that time. n52 No forensic evidence is available to inform these questions, and the traditional means that judges employ to evaluate the credibility of witness testimony are un-illuminating because they presuppose similarities in language and culture between judges and witnesses that simply do not exist in the international context. Witnesses fail to answer questions, and we cannot know whether it is because they do not know the answers, or because they do not wish to provide them. Witnesses testify haltingly and dance around the relevant topics, and we cannot know whether they do so because that is their normal pattern of speech, because they do
not understand the questions they have been asked, because they have in fact answered directly but a mistranslation has created a seeming divergence between question and answer, or because the witness purposely wishes to evade the question. And there is no possibility of knowing what to make of the many inconsistencies between witness testimony and pre-trial statements that pervade international criminal proceedings. Witnesses attribute these [*261] inconsistencies to investigators' errors. Defense counsel attribute them to witness mendacity. And each explanation, along with a host of others, is plausible.

III. Implications of the Testimonial Deficiencies

The testimonial deficiencies that I have described above have serious implications for the way in which we conceptualize international criminal fact-finding. In my book, I argue international criminal trials are a much less reliable fact-finding mechanism than they appear on the surface. I will briefly discuss that conclusion in Section A, and will then go on to describe the Trial Chambers' own assessment of the testimonial deficiencies in Section B. That discussion reveals that the judges of the ICTR, SCSL and Special Panels take a cavalier approach to testimonial deficiencies, and at least partially as a consequence, convict virtually every defendant who comes before them. I seek finally in Section C to explain the Trial Chambers' cavalier approach by invoking organization liability principles derived from the Nuremberg Charter. My study also raises various normative questions, which I can only touch upon here, but which I thoroughly address in my book.

A. The Implications of Testimonial Deficiencies on International Criminal Fact-Finding

International criminal tribunals conduct their trials pursuant to a blend of adversarial and inquisitorial criminal procedures. The procedures vary slightly from one Tribunal to the next, and they diverge even more markedly from domestic procedures that are predominantly adversarial or inquisitorial. n53 These differences notwithstanding, international criminal trials, both in their broad structural outlines and in their ostensible commitment to Western due process norms, very much resemble a domestic criminal trial that might [*262] be held in any Western nation. And therein lies a problem, for while international criminal trials appear on the surface to be Western-style trials, they in fact constitute a much less reliable fact-finding mechanism. Indeed, the Western trial form in which international criminal proceedings cloak themselves, embody certain fact-finding expectations that international criminal proceedings are unable to fulfill.

At the most basic level, it is expected that fact witnesses will recount their first-hand experiences in a way that is comprehensible to the recipients of their testimony and that provides those recipients sufficient information about the events in question. That is not to say that witnesses in Western domestic trials always attend to and convey key details. Nor is it to say that international witnesses never provide a reasonably detailed account of the events they witnessed. But they frequently do not, and on the whole, the Western trial form embodies the expectation that witnesses will provide a more detailed, more thorough account of the events they witnessed than international witnesses routinely are able to deliver.

The use of the Western trial form also conveys the expectation that when called upon to decide between competing factual accounts, fact-finders will be able to inform their decisions by assessing the credibility of the witnesses who appear before them. Concededly, the value of such credibility
assessments is open to question even in municipal trials where fact-finders and witnesses share the same cultural norms and language. Recent research suggests, for instance, that people are not as good at detecting prevarication as they think they are. At the international tribunals, however, the cultural and linguistic "distance" between fact-finders and witnesses is so vast that it leaves fact-finders without any meaningful frame of reference. The use of interpreters makes it difficult for fact-finders even to know how the witness is testifying; that is, whether the witness is hesitating before answering, for instance, or rather is answering expeditiously with seeming confidence. And even when that information is known, it is of little value because international fact-finders cannot know what to make of it.

The Western trial form also creates the expectation that pre-trial investigations will serve to narrow contested issues both by establishing background facts and providing an efficacious means of testing witness accounts. Investigations are presumed capable of providing fact-finders with a degree of certainty about a wide range of issues surrounding those issues that are disputed at trial. Investigations are assumed to be capable, moreover, of identifying some quantity of witness lying and deterring a great deal more. [\textsuperscript{263}] A witness will not falsely claim that an anti-Tutsi rally took place in a certain stadium, for instance, if she knows that a cursory investigation into the stadium's records will show that no rally occurred. Investigations can rarely perform either of these functions at the international criminal tribunals, however. Investigations are costly and difficult to conduct in the regions in question and are frequently unproductive even when they are conducted. Because so much daily life is carried out without written documentation, investigations rarely locate evidence that will conclusively prove a given fact. In most instances, the best that international investigators can hope to find are witnesses who will contradict the accounts given by the witnesses for the opposing side.

These arguments, which are presented here in very summary form, are fleshed out and supported in the book. To further summarize, however, I argue that current international criminal proceedings are conducted in a way that creates the illusion that they are routinely capable of reaching justifiable factual conclusions on the basis of evidence presented to them, when in fact, they are not.

B. The Trial Chambers' Treatment of Testimonial Deficiencies

I have contended that the testimonial deficiencies detailed above render international criminal fact-finding a far more uncertain endeavor than it outwardly appears. Here, I will consider how that conclusion impacts the accuracy of Tribunal judgments.

Prosecutors at the ICTR, SCSL and Special Panels charge defendants with performing specific acts in specific places during specific times. Assessing these allegations proves a considerable challenge given the vague, inconsistent and conflicting testimony that comprises so many international criminal proceedings. Indeed, if the Trial Chambers were asked to determine whether Emmanuel Ndindabahizi participated in attacks against Tutsi on Gitwa Hill, for instance, we might expect them to answer incorrectly a substantial portion of the time since the fact-finding impediments described above make it so difficult to reach accurate determinations of specific events. The Trial Chambers are not, however, asked to determine whether Ndindabahizi participated in the Gitwa Hill attacks. That question would place a preponderance-of-the-evidence standard on the prosecution. The Trial Chambers are rather asked to determine whether the prosecution has proven its factual allegations
beyond a reasonable doubt. That is a very different and potentially much easier question to answer, for while the testimonial deficiencies that pervade international criminal proceedings may [*264] make it virtually impossible to determine who did what to whom in an international case, that does not mean that it is difficult to determine whether or not the prosecution has proven its allegations beyond a reasonable doubt. That is, while we may expect that Trial Chambers would regularly reach erroneous conclusions if asked to decide cases on a preponderance-of-the-evidence standard, a beyond-a-reasonable-doubt standard stacks the deck in favor of the defendant and makes it much easier for Trial Chambers to answer correctly the legal question they have been asked.

Whether the Trial Chambers usually do reach the "correct" legal conclusions is not a question that I can answer. But what I can assess is whether the Trial Chambers' treatment of fact-finding deficiencies appears consistent with the beyond-a-reasonable-doubt standard of proof that ostensibly governs international criminal fact-finding. As I discuss in more detail in the book, some Trial Chambers fail even to mention serious testimonial deficiencies in their judgments, and while most Trial Chambers do acknowledge various problems, at least in a general way, they often unquestioningly attribute those problems to innocent causes that do not impact the witness's credibility. Those attributions may be appropriate in many cases, but they also may not be, and even when testimonial deficiencies do have innocent causes, they nonetheless can seriously impair the defendant's ability to present his defense. Chapter Seven describes the Trial Chambers' treatment of fact-finding deficiencies in some detail, so I will confine myself here to reporting that, as a general matter, the Trial Chambers adopt a cavalier attitude toward testimonial deficiencies. They invoke educational or experiential deficiencies to explain the failure of many witnesses to provide relevant details or to answer whole ranges of questions, and because the Trial Chambers apparently consider it unfair to hold such deficiencies against the witnesses, they overlook the potential impact of vague and undetailed testimony on the defendant's ability to present a defense. When it comes to inconsistencies between witnesses' testimony and their previous statements, the Trial Chambers explain these away as products of the passage of time, the frailty of memory, and errors introduced by investigators and interpreters. The Trial Chambers thus give the prosecution witnesses the benefit of the doubt, and they explain away problematic features of their testimony on the basis of innocent factors that are beyond the witnesses' control. In sum, Trial Chambers are often content to base their convictions on deeply flawed testimony.

Given the vague, inconsistent testimony that is the standard fare at the international tribunals, the high incidence of perjury, and the difficulty in verifying even the most basic facts at issue in a case, one might have thought that Trial Chambers would rarely be able to conclude that the prosecution [*265] had proven its allegations beyond a reasonable doubt. That is, we might have expected that the prevalence and severity of the testimonial deficiencies would lead Trial Chambers to acquit a substantial proportion of defendants. In fact, quite the opposite is true: the international tribunals convict virtually every defendant who comes before them of at least one of the crimes for which they are charged.

The SCSL is running a one-hundred percent conviction rate at present, having convicted all eight of the defendants who have thus far come before the Court. The Special Panels is not far behind with a ninety-seven percent conviction rate. The Special Panels acquitted a paltry three defendants out of the eighty-seven that it tried, n55 and even those figures understate the true acquittal rate because in two of the three acquittals, prosecutors themselves recognized that there was insufficient evidence
on which to base a conviction and sought to withdraw their indictments. Thus, only one out of eighty-seven defendants was acquitted after a contested trial. The ICTR's conviction rate - at eighty-five percent - is considerably lower than the other two tribunals, and its six acquittals in fact help us to reconceptualize Tribunal fact-finding, a topic I mention below and thoroughly detail in Chapter Eight of the book.

Suffice it to say here that the Trial Chambers' lackadaisical attitude toward testimonial deficiencies appears to reflect a pro-conviction bias. Now, let me be clear that when I maintain that the Tribunals' fact-finding embodies a pro-conviction bias, I am not suggesting that the Trial Chambers are convicting innocent defendants. Far from it, as I will discuss below. What I am suggesting, however, is that the Trial Chambers' cavalier attitude toward fact-finding impediments is inconsistent with the beyond-a-reasonable-doubt standard of proof. As I have noted, many cases of problematic testimony feature uncertain causes. Circuitous answers could reflect culturally influenced patterns of speech or efforts to evade. Inconsistencies between testimony and a pre-trial statement could signify an investigator's errors or a witness's desire to frame the defendant. Because there do exist persuasive reasons in most instances for overlooking discrepancies and explaining them and other problematic features of witness testimony on the basis of "innocent" explanations, the Trial Chambers' inclination to do so would be unproblematic if they were deciding cases on a preponderance of the evidence standard; that is, if they had only to decide which account of events - the prosecution's or the defense's - was more likely than not to be the accurate [*266] one. The Trial Chambers are not so charged, however. They are required to acquit the defendant unless the prosecution has proven its facts beyond a reasonable doubt. The question, then, is not whether a particular testimonial deficiency can be plausibly explained away - most of them can. The question is rather whether the existence of that deficiency in testimony that is sharply contested by defense witnesses and cannot be objectively verified by documentary or forensic evidence should be considered to give rise to a reasonable doubt. Considered in isolation, I believe that the answer to that question in most cases is yes. The Trial Chambers do not consider the question in isolation, as I explain below, and that fact goes some ways towards explaining why the Trial Chambers so rarely reach that answer.

C. Reconceptualizing International Criminal Fact-Finding

A final question that I will address here is why the Trial Chambers treat testimonial deficiencies so cavalierly. Are the judges conviction-happy? Certainly some judges may not possess the most steadfast commitment to due process standards, and other judges may be unconsciously influenced by the fact that acquittals do not play well either with the international community that funds the Tribunals or with the victims of international crimes. But the most compelling explanation for the Trial Chambers' willingness to overlook testimonial deficiencies lies in notions of organizational liability that derive from the Nuremberg Charter. Article 9 of the Nuremberg Charter authorized the Nuremberg Tribunal to declare an organization of which a defendant was a member to be a criminal organization. Once the organization was declared criminal, then its members could be convicted in subsequent trials solely on the basis of their membership in the organization. Under Article 9, then, the prosecution could convict large numbers of Nazis in summary proceedings. The Nuremberg Tribunal ended up gutting the plan by holding that the prosecution had to prove not only that the defendant was a member of the criminal organization but that he had voluntarily joined the organization and knew of its criminal purposes. The imposition of these proof requirements
substantially diminished the logistical advantages that Article 9 was intended to deliver, so it was not surprising that the charge of membership in a criminal organization played a relatively minor role in the subsequent trials of Nazis held pursuant to Control Council Law No. 10. A meager eighty-seven defendants were charged and tried on this ground, and of the seventy-four who were convicted, only ten were convicted on the [*267] membership charge alone. n56 That, then, seemed to put an end to organizational liability; indeed, no other subsequent tribunal has even considered including a provision resembling Article 9. I argue, however, that the thinking that underlay organizational liability continues to powerfully influence international criminal fact-finding and serves to explain the Trial Chamber's cavalier treatment of testimonial deficiencies.

In particular, although international criminal indictments typically charge defendants with performing particular acts - distributing weapons at a massacre site, for instance, or participating in the massacre itself - these acts are difficult to assess. In consequence of that difficulty, I believe that the Trial Chambers draw inferences from the defendant's group membership or official position and use those inferences to supplement the often problematic witness testimony that ostensibly forms the bases for the Trial Chambers' judgments. Such inferences have long been influential in domestic criminal fact-finding. In medieval and early modern times, probabilities were drawn from the sex, age, education and status of the defendant. Children were thought to be much like their parents, so a family's lifestyle might be invoked to prove a defendant's dishonesty or scandalous behavior. Men were thought more likely to be robbers and women poisoners, while well-bred men of professional classes were considered more likely to be innocent of the charges than men of more modest occupations or slaves. n57 Modern-day fact-finders are just as likely to draw inferences from various aspects of a defendant's life, which is why evidence of a defendant's gang membership, for instance, is typically excluded from the jury. n58

Inferences drawn from official position are apt to be all the more influential in the context of international crimes for a number of reasons. First of all, the fact that the international tribunals face such daunting evidentiary challenges raises the value of such indirect evidence as official position. [*268] Moreover, given the nature of international crimes, a defendant's official position truly does provide useful information about the defendant's likely culpability in many cases. International crimes such as those which form the subject matter of current international trials involve large-scale violence perpetrated by large numbers of offenders. These are crimes that are orchestrated by the state or by state-like entities that carry out their activities through more or less well-organized sub-bodies that feature more or less well-established lines of authority. Thus, once it has been proven that a particular group is responsible for the atrocities, then the defendant's official position in that group is unquestionably probative of his involvement in the atrocities.

Say, for instance, that the prosecution charges the defendant with ordering civilian killings during a particular attack. As former ICTY and ICTR lead Prosecutor, Carla Del Ponte, has observed: "When large-scale crimes are carried out systematically by military, police or quasi military organs requiring communication and coordination it is logical to infer that criminal activity must have been the result of orders." n59 And if the defendant was the commander of that attack, it is equally logical to infer that the orders were given by the defendant. For that reason, even if the prosecution's direct evidence that the defendant ordered the killings is only meager and problematic witness testimony, the fact that the defendant was the commander of an attack that featured the widespread
and systematic killing of civilians is a fact that can compellingly supplement the meager and problematic witness testimony about the orders the defendant gave.

That example highlights the way in which a defendant's position might be relevant to the specific crimes for which he is charged, but often the relationship between the official position and the crime derives not so much from the specific facts of the crimes or the precise contours of the defendant's official duties, but rather from a more amorphous, common-sense understanding that the defendant could not have held the position he did without playing some role in the atrocities. Consider Adolf Eichmann who was Head of the Gestapo's Office of Jewish Affairs. Merely to recognize his title is to presume his involvement in Nazi atrocities against the Jews. The contours and implementation mechanisms of modern-day massacres in Rwanda, Sierra Leone and East Timor are less well-known to Western audiences, but they too can feature Eichmann analogues. For instance, Foday Sankoh's position as the leader of the RUF - the Sierra Leonean rebel force that is widely blamed for having amputated the limbs of thousands of civilians - creates the strong inference of his involvement in international crimes. The leadership of the Rwandan genocide is less clear-cut, but even there, some positions appear patently pertinent to the defendant's likely culpability. For instance, the Interahamwe - which was the youth wing of the MRND political party - has been widely blamed for zealously implementing the genocide throughout Rwanda. As a consequence, the fact that ICTR defendant Georges Rutaganda was Vice President of the National Committee of the Interahamwe has to be relevant - at least in a gestalt sort of way - to the Trial Chamber's assessment of the testimony that placed Rutaganda at various massacre sites.

However persuasive a defendant's official position might be in suggesting that the defendant played some - if an undefined - role in the atrocities, those suggestions rarely come to the fore because prosecutors typically present direct evidence of the defendant's role in the atrocities. So, although Rutaganda's position as Vice President of the National Committee of the Interahamwe is in and of itself suggestive of Rutaganda's criminal culpability given the Interahamwe’s well-established role in the Rwandan genocide, the prosecution sought to prove that Rutaganda personally distributed weapons, hunted down Tutsi, and participated in massacres, and it presented witnesses who testified that he had. Consequently, it is these allegations that appear in the indictments, these allegations that prosecutors seek to prove by means of the problematic witness testimony described and these allegations that underlie the convictions that are the end result of virtually every case. The problem, of course, is that it is these allegations that are so difficult to prove beyond a reasonable doubt for all the reasons heretofore discussed. Of course, the Trial Chambers do routinely find them proven beyond a reasonable doubt. But this is where the defendant's official position becomes relevant, for the Trial Chambers find these allegations proved beyond a reasonable doubt, I believe, in large part because the Chambers supplement the very muddy evidentiary picture that is presented to them at trial with common-sense inferences that they draw from the defendant's official position. These common-sense inferences, indeed, can be seen as bridging the gap between the prosecution’s poorly supported factual allegations and the Trial Chambers' convictions. Reliance on such inferences, in fact, helps both to explain and to justify factual findings that seem questionable on their face. I discuss numerous examples in my manuscript and what I found is that the more a defendant's official position seems almost to scream out his liability for some crime, the less concerned that the Trial Chambers seem to be about testimonial deficiencies that might undermine the prosecution's account of this or that particular act.
In sum, because objective or reliable evidence is so hard to come by in international proceedings, Trial Chambers rely on official position as a proxy, an indicator, if you will, of the defendant's involvement in the atrocities. Prosecutors must still present some evidence to support the specific allegations appearing in the indictment, but the stronger the inferences that can reasonably be drawn from official position, the more that Trial Chambers are willing to attribute problematic features of prosecution witness testimony to innocent causes. But just as a defendant's official position can suggest a defendant's involvement in the atrocities and by doing so can lead Trial Chambers to take a cavalier attitude toward testimonial deficiencies, other proxies can motivate Trial Chambers to more carefully scrutinize testimonial deficiencies. Indeed, although I have maintained that Trial Chambers are generally inclined to ignore or explain away testimonial deficiencies, a careful examination of the ICTR acquittals reveals that that is not always the case. Indeed, in a number of these acquittals, the evidence supporting the prosecution's allegations was similar in quality and quantity to the evidence supporting most ICTR convictions. The cases resulted in acquittals rather than convictions, however, and the different results stemmed from the different treatment given to the deficiencies.

In particular, in these acquittal cases, the Trial Chambers appeared to make far more searching inquiries into testimonial deficiencies than is the norm at the ICTR. The Trial Chambers scrutinized identifications more carefully, they discredited testimony on the basis of vagueness or inconsistencies of the sort that are routinely overlooked or explained away in other cases, and they seemed, as a general matter, to apply the beyond-a-reasonable-doubt standard with greater rigor. And while one can hypothesize numerous factors that might contribute to this enhanced scrutiny - from the temperament of the judges on the panel to the demeanor of witnesses on the stand - a careful examination of the cases suggests that the inclination of these Trial Chambers to conduct a more searching inquiry into testimonial deficiencies was driven primarily by the Chambers' sense that the defendant did not generally support the genocide. In Bagilishema, for instance, defense counsel presented the defendant's letters that showed his efforts to maintain security in his commune and protect the Tutsi from violence. In Mpambara, the defense presented two particularly credible witnesses - a British physio-therapist and a Spanish priest - who testified that the defendant was likewise trying to stem the violence that was engulfing his commune. And in Bagambiki, the defendant did take some actions against the Tutsi, but his actions suggested his desire to reduce the overall level of violence, not facilitate or expand it. In Bagilishema, Mpambara and Bagambiki, prosecution witnesses attested to the defendants performing various genocidal acts, as in other cases, yet instead of overlooking the typical testimonial deficiencies that pervade witness testimony, the Trial Chambers carefully scrutinized those deficiencies and invoked them to justify their rejection of the witnesses' testimony.

In sum, just as the Trial Chambers' general sense that the defendant was involved in the genocide in some way - that he was one of the bad guys, as it were - inclines it to accept problematic inculpatory testimony about the specific acts that are attributable to the defendant in the indictment, the Trial Chamber's general sense that the defendant did not support the genocide - that he was one of the good guys, as it were - inclines it to reject problematic inculpatory testimony about those same sorts of acts. And because any given testimonial deficiency can be plausibly explained on the basis of innocent or not-innocent grounds, the Trial Chamber may choose from an array of rationales to justify its factual determinations.
My analysis suggests that while the Trial Chambers may be adrift with respect to assessing the specific allegations that appear in the indictments - the claim that the defendant called for the extermination of the Tutsi at a particular rally in Cyangugu, for instance, or the claim that at a particular passing out ceremony, the defendant instructed his subordinates to kill civilians - that uncertainty is less worrisome than it appears at first glance because frequently it is not the Trial Chambers' determinations about those specific allegations that drives their decision to convict or acquit defendants. The prosecution presents witnesses who testify in support of these allegations, and the Trial Chambers ostensibly assess this testimony and determine whether it is sufficient to prove the allegations beyond a reasonable doubt. The Trial Chamber's fact-finding about these allegations in turn form the bases for the Trial Chambers' legal conclusions - their decision whether a defendant committed genocide, for instance, or merely conspiracy to commit genocide or crimes against humanity. My analysis suggests, however, that Tribunal fact-finding is actually broader and less focused on the defendant's specific acts. The Trial Chambers are, I believe, engaging in a more comprehensive and holistic process that seeks to determine beyond a reasonable doubt whether the defendant was involved in the violence in some substantial way.

D. The Normative Analysis

The conclusions that I have thus far summarized give rise to a series of normative questions that I address in the final two chapters of the book. My [*272] analysis of these normative issues is lengthy and complex, and in light of the space constraints of this article, I will offer only the briefest of summaries.

First and foremost, my study requires us to explore improvements that might be made to enhance the accuracy of international criminal fact-finding. Two paths present themselves. The more attractive of the two seeks to improve testimonial quality so that it will provide a more solid foundation for the judgments that the Trial Chambers will eventually reach. To that end, I advocate various adaptations to the pre-trial, trial, and post-trial processes that currently exist at the international tribunals. I go on, moreover, to explore more radical reforms; in particular, I consider whether international trial procedures should be fundamentally reformulated, as a means of improving testimonial quality. The second, less desirable, path to improving fact-finding accuracy focuses not on improving the quality of the testimony offered in support of the Trial Chamber's judgments but rather on adapting the charges that the prosecution brings so that they better fit the (problematic) evidence that the Trial Chambers will receive. The second approach, then, assumes sub-optimal testimony and considers how we might use certain existing but controversial liability doctrines, such as joint criminal enterprise, to create a better alignment between the evidence that is received and the convictions that are entered. Improving that alignment, I argue, requires prosecutors to focus less on an individual defendant's particular actions and more on the defendant's role in the group criminality that characterized the atrocity as a whole.

Finally, the book's final chapter addresses the broadest and most pressing normative question: Will the fact-finding impediments that I have identified, if they persist, fatally undermine the work of the international tribunals? To explore that question, I first consider the adequacy of drawing inferences from official position and institutional affiliation. Although these proxies can provide useful information in many cases, they do so only when prosecutors target the "right" individuals and when the Trial Chambers have a sophisticated and nuanced understanding of the way the violence
was carried out in the region in question. Assuming that these requirements are not always met, I evaluate the fact-finding approach adopted by the SCSL's Appeals Chamber in the AFRC case, since it would reduce the impact of the testimonial deficiencies. Concluding that this approach is also deficient in some regards, I consider the most controversial, most problematic means of justifying current international criminal fact-finding: a reduction in the standard of proof. I rely on historical precedents, epistemological arguments, and a comparison with domestic prosecutions to conclude that a standard-of-proof reduction can be defended as a theoretical matter. Nonetheless, I conclude [*273] that it should not be undertaken. I go on, however, to consider recent legal and empirical scholarship that views the beyond-a-reasonable-doubt standard as a variable standard that signifies (and that should signify) different levels of certainty in different cases. This research not only provides an alternative explanation for international criminal fact-finding but also enables us to construct a solid justification for it.

FOOTNOTES:


n2. Richard Goldstone called the new international tribunals "a tremendous and exciting step forward," Richard Goldstone, Conference Luncheon Address, 7 Transnat'l L. & Contemp. Probs. 1, 2 (1997), while Payam Akhavan hailed them as "an unprecedented institutional expression of the indivisibility of peace and respect for human rights" that represented "a radical departure from the traditional realpolitik paradigm which has so often and for so long ignored the victims of mass murder and legitimised the rule of tyrants in the name of promoting the purported summum bonum of stability," Payam Akhavan, Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda, 7 Duke J. Comp. & Int'l L. 325, 327 (1997) (italics added). At least that was the view of commentators with an internationalist perspective. Scholars of a realist bent have questioned the wisdom and viability of international trials. See, e.g., Jack Goldsmith & Stephen Krasner, The Limits of Idealism, Daedalus, 47-53, Winter 2003, available at http://www.jstor.org/stable/20027822; Anthony D'Amato, Peace vs. Accountability in Bosnia, 88 Am. J. Int'l L. 500, 500-02 (1994). For a brief discussion of the realist critique of international criminal law, see Drumbl, supra note 1, at 10.


HUMAN RIGHTS COUNCIL
Eleventh session
Agenda item 3

PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*

Addendum

MISSION TO KENYA**

* Late submission.

** The summary of the present report is circulated in all official languages. The report, annexed to the summary, is circulated as received, in the language of submission only.
Summary

The Special Rapporteur visited Kenya from 16 to 25 February 2009 in order to ascertain the types and causes of unlawful killings; to investigate whether those responsible for such killings are held to account; and to propose constructive measures to reduce the incidence of killings and impunity. The main focus was on killings by the police, violence in the Mt. Elgon District, and killings in the post-election period.

Interviews were conducted with Government officials, representatives of civil society, victims and witnesses, in five of the eight administrative provinces or areas in Kenya, as well as with officials of United Nations agencies and members of the diplomatic community. Over 100 lengthy witness interviews were conducted. In advance of the mission, the Special Rapporteur reviewed detailed reports from Government and civil society sources, and during the mission a strong effort was made to hear diverse perspectives and consider conflicting information in order to arrive at a fair and balanced understanding of the issues.

The Special Rapporteur came to the conclusion that police in Kenya frequently execute individuals and that a climate of impunity prevails. Most troubling is the existence of police death squads operating on the orders of senior police officials and charged with eliminating suspected leaders and members of criminal organizations. Such groups harass and kill Kenyans, and strong policing is required to counter the threat. Carte blanche killing by the police, however, does nothing to eradicate such criminality; rather, it perpetuates the sense that the police are good at killing and bad at law enforcement. For policing to truly create security, it must be conducted with respect for the human rights of all, including those of suspects and victims. A lack of police accountability for killings results from the absence of effective internal or external investigation or oversight mechanisms.

The Special Rapporteur concludes that, in Mt. Elgon, both the Sabaot Land Defence Force militia and the Government’s security forces are engaged in widespread brutality, including torture and unlawful killings, against Mt. Elgon’s residents. Detailed reports from a broad range of sources documenting this abuse have not been seriously investigated by the police or the military. Both groups remain in denial of such abuses and their response to systematic civil society reporting has been to methodically intimidate human rights defenders and witnesses.

Widespread violence followed the general elections held in December 2007. A national commission of inquiry, chaired by Justice Waki, detailed the circumstances and causes of 1,113 killings that occurred in that period. The Government deserves significant credit for establishing this successful and independent inquiry. However, despite the pressing need for measures to address the systemic causes of the violence and to provide accountability for abuses, the recommendations made by the Waki Commission have yet to be implemented. Those responsible for the post-election violence, including police force members responsible for extrajudicial executions and officials who organized or instigated violence, remain immune from prosecution almost 18 months later. Witnesses to many of these killings are terrified to speak out. A witness-protection programme that has already absorbed significant resources has yet to protect a single witness.
Many of the human rights defenders who testified before the Special Rapporteur during his mission were threatened and harassed by members of the security forces and other Government officials. Two activists who had been particularly active in reporting on police death squads were murdered just two weeks after the mission ended. There has been a systematic attempt to silence criticism of Kenyan security forces.

While the existing situation is bad, it is far from intractable. If it so chooses, Kenya can significantly reduce the prevalence of unlawful killings. Much of the institutional and legal structures needed to carry the reform process forward is in place. The international community is keen to support a genuine reform programme. Kenyan citizens are politically engaged and civil society is professional and serious, and contributes substantially to the protection of human rights by monitoring abuses and proposing reforms.

The causes of many unlawful killings are well defined, and relatively straightforward steps could be taken to improve the situation. The Government of Kenya can choose to deny the existence of problems or insist that they are under control, while the killings and impunity continue; such a path will lead inexorably to chaos and large-scale violence within a relatively short time. Or it can choose to acknowledge the scale of the problem and implement a reform programme to end extrajudicial executions, thus sending the message that impunity will not be tolerated.
Annex

REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON, ON HIS MISSION TO KENYA (16-25 February 2009)

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I. INTRODUCTION AND APPLICABLE INTERNATIONAL LAW

1. I visited Kenya from 16-25 February 2009. My principal focus was on allegations of unlawful killings by the police in their day to day work, by the military (especially in relation to the conflict in Mt Elgon), and by diverse actors in the violence that followed the December 2007 general elections. Of particular concern was the impunity enjoyed by those responsible for the vast majority of these killings.

2. A briefing on the contents of my preliminary findings was provided in person to the Minister of Justice and a copy of the conclusions and recommendations presented at the press conference was provided well in advance to both the principal liaison officer for the mission, at the Ministry of Justice, as well as to the Ministry of Foreign Affairs.

3. Kenya is a party to both the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples’ Rights. International law prohibits the “arbitrary deprivation of life”,¹ and obligates governments to both “respect and ensure” the right to life.² Thus, governments themselves must desist from unlawful killings, and must protect their people from killings by others.³ In order to save lives, lethal force may be used by law enforcement officers, as long as it satisfies the twin safeguards of necessity and proportionality.⁴ Thus, police officers may shoot to kill only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary).⁵

4. Kenya’s international obligations also require it to effectively investigate, prosecute, and punish all those responsible for unlawful killings.

II. EXTRAJUDICIAL EXECUTIONS BY POLICE

5. Killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned. It is impossible to estimate reliably how many killings occur, because the police do not keep a centralized database. But police shootings are

¹ ICCPR, Art 6(1); ACHPR, Art 4.
² ICCPR, Art 2(1).
³ The obligation to protect is also mandated in Kenyan domestic law: Police Act, s 14; Criminal Procedure Code, s 62.
⁴ I have discussed the principles of necessity and proportionality, including on their elaboration in the UN Code of Conduct for Law Enforcement Officials and in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in a report to the General Assembly, A/61/311, paras. 33-45.
⁵ A/61/311, paras. 33-45; see also Basic Principles, Principle 9; Code of Conduct, art. 3.
reported nearly every day of the week by the press and the total number is certainly unacceptably high. In just a five month period in 2007, the Kenya National Commission on Human Rights (KNCHR) documented approximately 500 people killed or disappeared.

There are six primary factors which account for the frequency with which police can kill at will in Kenya: (i) official sanctioned targeted killings of suspected criminals; (ii) a dysfunctional criminal justice system incentivizes police to counter crime by killing suspected criminals, rather than arresting them; (iii) internal and external police accountability mechanisms are virtually non-existent; there is little check on, and virtually no independent investigations of, alleged police abuses; (iv) use of force laws are contradictory and overly permissive; (v) witnesses to abuse are often intimidated, and fear reporting or testifying; and (vi) the police force lacks sufficient training, discipline and professionalism.

**A. Context**

Kenyans are subjected to significant levels of both indiscriminate and organized violent criminality. Armed robbery, carjacking, and violent street crime are all common. In addition, criminal organizations exercise vicious control over significant geographical areas and infrastructure in slums in Nairobi and Central Province.

There are many such criminal groups, but the Mungiki have become particularly prominent. In many slums in and around Nairobi, there have historically been high levels of insecurity, and few state services. In the early 1990s, the Mungiki, initially a cultural-religious movement, began providing security and basic services in slums. While many of these activities

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7 According to information provided by the police, robbery rates were as follows: 2004 (2251), 2005 (2511), 2006 (1257), 2007 (759). Robbery with violence: 2004 (5018), 2005 (4010), 2006 (3594), 2007 (2643); murder: 2004 (1595); 2005 (1260); 2006 (1286), 2007 (1261).


9 Most accounts of the origins of the Mungiki date them to the late 1980s. They started in the Rift Valley, drawing members from the Kikuyu tribe. Early organizers drew upon the Mau Mau struggle, and articulated their aims in terms of liberation from oppression, and a return to indigenous traditions. Membership grew in the Rift Valley in the early 1990s, as the Kikuyu increasingly became victims of ethnic violence. Membership then spread to the slums of
were originally appreciated by slum residents, as the Mungiki grew, so did its level of control, and ruthless tactics were employed to preserve it. Today, the Mungiki are responsible for a large number of crimes, including murder. I spoke with many people who live and work in areas now controlled by the Mungiki. Residents and business owners are extorted for “protection” fees. Matatu (bus) drivers are harassed on a daily basis. Those who resist organized criminal organizations are threatened, beaten or killed, often in an especially brutal manner, and residents are increasingly terrified of the progressively more violent criminal control of their neighborhoods.

**B. Evidence of widespread killings by police**

9. The Government has a clear obligation to protect citizens from Mungiki and other criminal violence, while respecting human rights, including the right to life. Suspects should be arrested, charged, tried and punished accordingly. In a context of violent criminality, police will inevitably be required to use force on occasion, and sometimes lethal force in order to protect life. The police, including the Police Commissioner, assured me that there have been no unlawful police killings. However, as I detail below, the evidence is compelling that the police respond - frequently - with unlawful force: murdering, rather than arresting suspects. Further, investigations by police are so deficient and compromised that claims by the police that all killings are lawful are inherently unreliable and unsustainable.

10. During my mission, I received compelling evidence that death squads - including one called *Kwekwe* - exist within the police force in Kenya, and that these squads were set-up to eliminate the Mungiki and other high-profile suspected criminals, upon the orders of senior

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**Nairobi.** In the slums, the Mungiki initially cleaned the sewerage and toilet systems and connected water supplies, and began campaigns against alcohol/drug abuse and rent hikes and conducted HIV/AIDS awareness.

**10** Mungiki activities primarily affect those living in Nairobi and Central Province. According to information provided to me by provincial officials in Central Province, the areas most affected by Mungiki activities in Central Province are the districts of: Thika, Kiambu, Murang’a South, Nyandarua, and Murang’a North.

**11** Fees depend on location and “service”. For example, each matatu is generally required to pay a daily fee of between 100-200 KSH.

**12** At various times, Mungiki-matatu violence has flared. For example, in March 2007, some 600 matatu owners and drivers held a demonstration against Mungiki activities along bus routes from Kiambu, Banana, and Githurai to Nairobi. According to Government accounts of the incident, matatu drivers burned the homes of suspected Mungiki members. Two matatu drivers were subsequently murdered. In April 2009, violence erupted between the Mungiki and a vigilante group (“the Hague”), apparently formed by residents to counter Mungiki control. Some 30 people were killed.
police officials. Detailed evidence was provided by civil society investigations, witnesses to the squad’s activities, survivors of attempted killings, family members of deceased or disappeared victims, and victim autopsy reports indicating shots at close range and back entry wounds. A further key component of this evidence is the now public testimony of a police whistleblower, who recorded his statement in July 2008, before he was murdered while in hiding in October 2008. His account provides, in precise and often excruciating, detail the composition and operations of the death squad in which he was a part, and the circumstances of the murder of 67 persons between February 2007 and July 2008. Together, this evidence implicates the Commissioner of Police, and senior police officials from the Criminal Investigation Division, Special Crime Unit, and the Criminal Intelligence Unit. From this large amount of testimony, it is possible to set-out in detail the operations of the death squads:

- The suspected Mungiki or other criminal suspects appear to nearly always be known and individually targeted by police in advance. The police carrying out the operations (those driving the vehicles and committing the murders) are generally ordered by senior police to pick up a specified individual at a particular location (often his home, workplace, or a road on which he is believed to be traveling).

- While most suspects are individually targeted, police will generally also detain others who may be accompanying the target at the time of arrest.

- Very often, the initial detention is witnessed by family members, co-workers, or bystanders. In one well-known case, a man was actually photographed by a member of the press while being arrested.

- Some suspects are murdered at the location of arrest. They are generally ordered by the police to lie down on the ground and are then shot. Police then attempt to set the crime scene to look like a “shoot out” occurred between criminals and police - weapons will be placed next to the bodies of the suspect, and fired into the air to give the appearance of an exchange of fire. Such victims are often taken to the mortuary by the police.

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14 E.g. Appendix II: Case 6, Case 7, Case 8, Case 9.

15 Appendix II: Case 4, Case 7, Case 8, Case 11, Case 13.

16 Appendix II: Case 3.

17 Appendix II: Case 3.
In other cases, the suspects are not immediately murdered, but are taken from the site of initial detention in generally unmarked police vehicles or private vehicles.\(^\text{18}\) The squads frequently work in convoys of 2-5 vehicles.

Once detained, the suspect is most often held irregularly, and no record of the detention is made in the police Occurrence Book. Some suspects will be taken to police stations, or moved between multiple stations. Others are held in vehicles for a number of hours. Once family members realize that their relative was arrested or is missing, they generally embark on a search of police stations.\(^\text{19}\) Family members usually report obstruction or intimidation from officials in this process.

In some cases, the police demand a ransom from the detainee, or call the relatives and demand a ransom upon threat of death to the detainee. In many cases, payment of the ransom is sufficient to obtain the detainee’s release. Some victims have been detained and forced to pay ransoms on multiple occasions. Others have paid the ransom, but were then followed by police and subsequently murdered.\(^\text{20}\)

Those suspects who are murdered in locations other than the site of initial detention are generally eventually taken in vehicles to a remote area, such a forest or farmland. Many of these individuals are interrogated and tortured for a number of hours. Those who are suspected Mungiki are asked about their role in the Mungiki sect, and for the names and details of other Mungiki members or leaders.\(^\text{21}\)

During the detention or interrogation period, there is often communication via mobile phone between the interrogating officers, and senior officers at headquarters or police stations. In at least one case, the interrogations were tape-recorded, and played back via phone to senior police.\(^\text{22}\)

Those suspects taken to remote areas are typically killed through strangulation, or by being beaten to death by pangas (machetes), rungus (sticks), or other means. Their bodies are generally left in the forest or farm area, and found by local residents.\(^\text{23}\)

\(^{18}\) Appendix II: Case 6, Case 7, Case 9.

\(^{19}\) Appendix II: Case 3, Case 7, Case 11, Case 13.

\(^{20}\) Appendix II: Case 4, Case 5, Case 6.

\(^{21}\) Appendix II: Case 7.

\(^{22}\) Appendix II: Case 7.

\(^{23}\) Appendix II: Case 6, Case 7, Case 9.
• Many victims are last seen by witnesses or family members being arrested by police, but are never found.\(^{24}\)

11. Evidence presented to me indicates that these targeted and planned death squad killings are only the tip of the iceberg of police killings in Kenya. In addition to the death squad killings described above, I received detailed information on a wide range of circumstances in which unlawful killings have taken place. Sometimes, the police kill in the context of a bribery or extortion attempt. Some incidents appear to be motivated by purely private reasons (such as a personal dispute).\(^{25}\) In others, the evidence suggests that the police were shooting indiscriminately or recklessly.\(^{26}\)

12. Lethal force is also commonly used in legitimate law enforcement operations in which the police could have readily made an arrest. Some of these killings would be prevented through the provision of unambiguous guidelines on when police may use lethal force. The use of force by police is regulated by the Constitution of Kenya, the Police Act, and the Force Standing Orders.\(^{27}\) In addition to being unclear and contradictory, these laws do not meet the requirements of international law which requires the use of force to be both necessary and proportionate, and permits intentional lethal force only where it is required to protect life.\(^{28}\) The Constitution of Kenya, for example, states that there is no violation of the right to life if, \textit{inter alia}, the death occurred as a result of reasonably justifiable force used to protect a person from violence, to defend property, to effect a lawful arrest, to prevent an escape, to suppress a riot, or to prevent the commission of a criminal offence.

C. Official response to allegations

13. Some Government officials stated that if killings occurred, they were committed infrequently and by “rogue” officers. To their credit, a small number of Government officials did acknowledge the magnitude of the killings. But senior police officials were unwilling to acknowledge the problem at all: in essence, their response was one of denial, stone-walling, and obfuscation. In the provinces, my efforts were stymied by blanket denials by police, the provision of partial or inconclusive data, or by referring me back to police headquarters in Nairobi. The official police account of any killing is generally predictable: the suspect was an armed criminal, there was a “shoot-out”, and the police reacted with appropriate force. Senior

\(^{24}\) Appendix II: Case 4, Case 8, Case 13.

\(^{25}\) Appendix II: Case 1.

\(^{26}\) Appendix II: Case 2.

\(^{27}\) Constitution of Kenya, s 71; Police Act, s 28; Criminal Procedure Code, s 21; Police Force Standing Orders, Appendix 51A.

\(^{28}\) See: A/61/311, pages 12-16.
police flatly denied to me any knowledge of the *Kwekwe* death squad. And yet its existence was confirmed in Parliament by the Minister of State for Provincial Administration and Internal Security, Professor George Saitoti.\(^{29}\)

14. On the first day of my mission I provided the Police Commissioner with a short list of issues on which I sought information. At the end of the mission, I received a written response. It largely refused to provide even basic information. For instance, the initial response to my request for the numbers of police employed in Kenya was, “not immediately available”. A subsequent response also declined to provide the information for national security reasons, but suggested a population to police ratio of 1:800.

15. During my mission, the police stated that they could not tell me how many people were killed by the police (whether in self-defence or otherwise), because there was no centralized data-keeping or monitoring; rather, records were kept in the inquest file register maintained at each police station. My press statement at the conclusion of my mission noted that this was simply unacceptable. Following my mission, I have been informed by the Government that the committee reviewing police standing operation procedures has been directed to draft a regulation establishing an updated database at police headquarters on all killings by police. I welcome this positive development.

16. In other respects, however, the police response to my visit has consisted of continued denials of all wrongdoing, ad hominem attacks against me, and apparent police involvement in the broad daylight assassination of two human rights defenders with whom I met. Rather than in any way addressing the substance of the allegations contained in my initial statement, some police officials have sought to structure public debate so that criticisms of police actions are equated with condoning criminal activity. In this way, the police have tried to position civil society - and also my own reporting - as aligned with the interests of criminal organizations. This in turn sets up the police to launch further attacks against the Mungiki and others, while failing to take any steps to address the real issues. Efforts to monitor and reform policing so that it is carried out with respect for human rights do not mean being “soft” on crime. Security policies only truly provide security if the rights of all - victims, the general public, police, and criminals - are respected. The violent police response to crime has done nothing to promote security. Innocent bystanders have been shot by police, the public has lost faith that the police force can protect them, and the police have undertaken few if any measures to investigate and prosecute those Mungiki and other criminals who continue to terrorize and extort private citizens.

17. Criminals should be arrested, not taken to a forest and tortured to death. In Kenya, members of criminal organisations - because of their regular intimidation of residents - are easily identifiable. This was repeatedly noted by witnesses to Mungiki violence and matatu drivers. If

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\(^{29}\) National Assembly of Kenya, Official Report, 12 February 2009, p 27: The Minister of State for Provincial Administration and Internal Security (Prof. Saitoti): “Mr. Speaker, Sir, I would also like to say that there is a body called *Kwekwe* Squad that has been talked about here. We had that body and I would like to inform this House that, instructions were given out for its disbanding.”
the police were serious about crime control, they would be able to locate and arrest suspects. Unfortunately, in many Mungiki controlled areas, police profit from criminal control by accepting bribes to permit continued Mungiki control. And in cases reported directly to me in the presence of the police, when called to respond to Mungiki extortion police officers have taken no action against the criminals, but instead exploited for themselves the opportunity to extort the public.

D. Removal of the Police Commissioner

18. The regular police force is under the command and direction of the Commissioner of Police, who is appointed directly by the President.\(^{30}\) There is no mandated consultation, no recruiting guidelines, and no formal vetting for the appointment.

19. While the current Police Commissioner was originally seen as a potential reformer, and rapidly established a highly centralized leadership style, he has since become the major single obstacle to police reform. As section II. B above indicates, there is abundant evidence linking him to a central role in devising and overseeing the policy of extrajudicially executing large numbers of “suspected criminals”. He flatly refuses to acknowledge that any unlawful killings are taking place, derides detailed and compelling reports to the contrary, blocks investigations, and prevents all transparency.

20. Most importantly in terms of the interests of the Kenyan population, he has utterly failed to devise any law enforcement strategy worthy of the name for dealing with Mungiki and other forms of criminality. Widespread killings of suspects and innocents alike, combined with a failure to reign in rampant corruption on the part of key officials, do not add up to a strategy for policing.

21. The President of Kenya should remove the current Police Commissioner, and formal guidelines, consultation, and vetting should be institutionalised for future appointments. Ideally, this would take place through a newly created Police Service Commission, as recommended by the Waki Commission.

E. Accountability and the criminal justice system

22. Failures in the criminal justice system, and in internal and external police accountability mechanisms, encourage the commission of unlawful killings by police.

23. The criminal justice system as a whole was widely described as “terrible”. Investigation, prosecution, and judicial processes are slow and corrupt. Predictably, this leads to widespread distrust of the system, and impunity for criminals (particularly for those with power and money). It also acts as an incentive for police to kill, rather than arrest suspects: because of the low probability of securing convictions, many police think it is easier and more effective to take “justice” into their own hands. And, significantly, police themselves also benefit from the systemic faults - they are rarely held to account for the abuses they commit.

\(^{30}\) Constitution of Kenya, Art 108.
24. In theory, if a killing occurs, the police provide the relevant information to a magistrate, so that an inquest can be opened.\textsuperscript{31} Where investigations disclose evidence that a private individual or a police officer is criminally responsible for a death, a murder case file is opened, and the case is prosecuted in Kenya’s High Court by state counsel from the Attorney-General’s office. The reality is very different.

1. Police investigations

25. Police investigations of murders are generally inadequate, due in large part to resource, training, and capacity constraints. But investigations are especially poor when the police themselves are implicated in a death. The cause of this is in part institutional: there is no independent internal affairs unit within the police force. Such cases are generally investigated by the Criminal Investigations Division (CID) - the division responsible for all complex or serious investigations. But the problem is also one of will: those at the top of the force lack the determination to investigate themselves, or the will to institute the reforms that would improve transparency and accountability.

26. The police response to the KNCHR’s report on extrajudicial executions is a typical example of police unwillingness to conduct serious investigations. The police report on the KNCHR investigations challenges the investigative capacity and skill of the KNCHR, criticizes the KNCHR for reporting the allegations to the President of Kenya and the UN, and concludes that there was “no” evidence of police complicity in the killings.\textsuperscript{32} A similar response was given in response to the KNCHR’s public release of the whistleblower testimony in February 2009. The police issued a statement challenging the reputation of the whistleblower, questioning why the KNCHR released the statement when it did, questioning the KNCHR’s commitment to human rights, and intimating that KNCHR officers receive payments from the Mungiki.\textsuperscript{33}

27. During my visit, police officials throughout the country blocked my attempts to find detailed information on investigations and inquests. For instance, the response to my written request for the number of inquiries opened by the police in response to complaints received against the police, was simply to state that every “action against a police officer is preceded by an inquiry file which is guided by the following regulations”, and then to quote the law. Nevertheless, particularly damning evidence of the quality of police investigations is revealed in communications between the police and the Attorney-General. The Attorney-General provided me a significant volume of correspondence between his office and police headquarters with respect to various cases in which police were alleged to have killed. The correspondence consisted of repeated letters from the Attorney-General directing the police to charge certain

\textsuperscript{31} Criminal Procedure Code, s 386.

\textsuperscript{32}“Kenya Police Preliminary Report by a Board of Inquiry to Investigate the Alleged Execution and Disappearance of Persons”, sent to the KNCHR by the Permanent Secretary, Secretary to the Cabinet and the Head of the Public Service on 17 March 2008.

\textsuperscript{33}“Allegations by KNHRC“, Statement by Kiraithe E.K., For Commissioner of Police, 24 February 2009.
individuals or to conduct further investigations. In one matter, two police officers opened fire at a group of youths on 31 December 2001. One person was killed, and three were seriously wounded. In March 2002, the police forwarded the investigation file to the Attorney-General. In May 2002, the Attorney-General directed the police to charge two police officers with murder and unlawful wounding, once certain gaps in investigations were remedied. After a number of months and reminder letters from the Attorney-General, the two policemen were eventually charged. However, a Magistrate dismissed the murder case because of a lack of evidence. The police had failed to conduct the additional investigations requested. In another murder case, the Attorney-General, through the DPP, sent letters to no avail in April, June, August, and September 2008, and January 2009 requesting the police to conduct further investigations so that a trial could proceed.

2. Prosecutions

28. The Attorney-General is a constitutional office-holder, a member of the National Assembly, a member of the Judicial Service Commission, the principal legal advisor to the Government, and has the constitutional power to conduct or stop prosecutions.\(^{34}\) For offences which can be heard in Magistrate’s Courts (including, for example, robbery), prosecutorial functions are delegated by the Attorney-General to the police. For offences over which only the High Court has jurisdiction (such as murder), prosecutorial functions are delegated to the Director of Public Prosecutions (DPP). The DPP has no security of tenure. His is a department of the office of the Attorney-General, not an independent office.

29. The Attorney-General has security of tenure, for life, and has been in office since 1991. He has overseen, for nearly two decades, a system that clearly does not work. The Attorney-General has the constitutional power to “require” the Police Commissioner to investigate any matter relating to an alleged offence.\(^{35}\) As documents provided by the Attorney-General clearly indicate, he is all too aware of the grave deficiencies in police investigations. But instead of using his constitutional powers to force individual investigations, and to promote essential institutional reforms, letters simply go back and forth for years, with cases neither investigated sufficiently, nor prosecuted. In addition, the repeated failure to prosecute any senior officials for their role in large-scale election violence over a period of many years (discussed below in section IV on post-election violence) has led to a complete loss of faith in the commitment of his office to prosecute those in Government with responsibility for crimes.

30. The Attorney-General and successive police commissioners have engaged in a game in which each insists the ball is in the court of the other, while both know that it has in fact been hidden so that no outcome can ever be declared. The Attorney-General then presents himself as the helpless victim of the intransigence or malfeasance of others. But this is a complete misrepresentation of the situation of an individual who has wielded immense power through a succession of government. In fact, his unrelenting failure to prosecute any senior officials implicated in extrajudicial executions renders him not just complicit in, but absolutely

\(^{34}\) Constitution of Kenya, Arts 26, 36, 68.

indispensable to, a system which has institutionalized impunity in Kenya. In order to restore the integrity of the office, the current Attorney-General should resign or be required to leave office. In future, prosecutions should be undertaken by a constitutionally entrenched and independent Department of Public Prosecutions. The powers to prosecute and to intervene in prosecutions should not be held by a political office-holder.

3. The judiciary

31. The judiciary in Kenya is an obstacle in the path to a well-functioning criminal justice system. Its central problems are crony opaque appointments, and extraordinary levels of corruption. I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to “lose” files, or to decide a case in a particular manner. Many reports over the last decade have documented this, and significant structural reforms have repeatedly been proposed to increase the transparency and accountability of the judiciary. The Kibaki Government botched its 2003 “radical surgery” strategy, and has done little since, despite the strongly proclaimed views of the Prime Minister and the former Minister of Justice that drastic reforms are required. The Chief Justice is of the view that the courts generally function well, and that corruption and discipline are being adequately dealt with by the Judicial Service Commission (JSC). In fact the JSC has done precious little to improve the functioning of the courts, and they are in need of radical reform.

32. It is essential that the judicial appointments procedure, and oversight of discipline of judges and magistrates is reformed. To this end, the JSC should be transformed so that its membership is representative; judicial officials are transparently vetted before appointment; merit-based criteria are met by appointees; and the Commission should have a more significant and transparent role in monitoring and removing judges. It should also establish an independent complaints procedure in relation to judicial behaviour.

36 The structure and powers are set out in the Constitution of Kenya, Chapter IV; the Judicature Act; the Magistrates Courts Act.

37 See, “Report of the Committee on the Administration of Justice” (1998) (the Kwach report) (detailing allegations that there was “actual payment of money to judges and magistrates to influence their decisions.”); Constitution of Kenya Review Commission, “Report of the Advisory Panel of Eminent Commonwealth Judicial Experts” (2002) (concluding that “the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform.”). Also see yearly reports on Kenya by Transparency International (reporting the judiciary as one of the most corrupt institutions in Kenya).

4. External oversight of police

33. External oversight of the police - through ombudsmen, oversight boards, or other institutional models - is essential in any system designed to ensure police accountability. The Kenyan police have long lacked such oversight, and this is a key systemic flaw ensuring impunity and continued killings.

34. While the police have demonstrated little will to promote real accountability, they should in fact be the first to support improved oversight. It would permit them to demonstrate to the public that they are professional, transparent, and trustworthy.

Public Complaints Standing Committee

35. A Public Complaints Standing Committee (PCSC) was set up on 21 June 2007. Its mandate is to receive complaints from the public against public servants, including the judiciary and police. I met with the PCSC, and its members are serious, and well-intentioned. However, the PCSC has no investigative capacity, and - short of the ability to receive complaints and channel them to the relevant Government department for response - no power. In fact, the PCSC often refers cases to the KNCHR because of the KNCHR’s greater capacity to investigate and follow-up on cases. At the time of my visit to Kenya, the PCSC had three complaints of killings by police before it. The complainants conducted their own investigations. The PCSC brought the cases to the attention of the police, but no progress had been made. The PCSC clearly does not have the teeth necessary to bring to account police perpetrators of abuse.

Police Oversight Board

36. On 4 September 2008, the Minister of State for Provincial Administration and Internal Security established a Police Oversight Board (POB). While the creation of such a board should have been a positive, it exists on paper only, devoid of offices, a secretariat, any full-time members, and the powers it would need to be effective.

37. It can “receive” complaints from the public and “evaluate” them, but its investigative powers are entirely inadequate. It can do no more than make recommendations to the Commissioner of Police, and has no authority to enforce its recommendations, make any binding decisions, or impose disciplinary measures on police officers. The board was set-up not by legislation, but by the Minister through a gazette notice. It can thus be dismantled by decision of the Minister. Its members are appointed and dismissed by the Minister, and no requisite qualifications are set out. In sum, the board lacks the independence and powers required to achieve even minimal accountability.


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III. EXTRAJUDICIAL EXECUTIONS IN MT. ELGON

A. Background

38. The general background to the Mt Elgon violence is well recorded elsewhere, and I will only outline its basic contours here. From the mid-1960s, various phases of a settlement scheme (Chepyuk Settlement Scheme, Phases I, II and III) were initiated by the Government to resettle and provide land to the Ndorobo and Soy sub-clans of the Sabaot people.

39. The Sabaot Land Defence Force (SLDF) militia was born out of disputes over the fairness of allocations in Phase III. The early membership of the SLDF appears to have primarily drawn its ranks from those who were unhappy with the results of Phase III and believed there was little alternative but to resist by force. The SLDF also used varying degrees of intimidation and force to increase its ranks. If members later became discontented with the activities of the SLDF, they were unable to leave without fear of fatal reprisals.

B. Sabaot Land Defence Force operations and militia atrocities (2006-2008)

40. It is clear that the residents of Mt Elgon district were terrorized by the SLDF militia for approximately two years (2006-2008). I spoke with many victims of SLDF abuse, and also with former members of the SLDF. From their testimonies, and together with police, Government, and civil society accounts, I have been able to form a detailed picture of the SLDF’s operations and abuses. Intimidation, physical abuse, and killings appear to have been carried out for three primary reasons.


42. In Phase III, 1732 plots of 2.5 acres each were available for allocation. The plots were divided equally between the Ndorobo and Soy sub-clans, with each clan getting 866 plots. But some 7000 sought the 1732 plots.

43. Appendix II: Case 15, Case 16.

44. Appendix II: Case 14, Case 17.

45. Appendix II: Case 16, Case 17.
41. First, those occupying land desired by the SLDF - especially members of the Ndorobo sub-clan, who most SLDF saw as their “enemy” in land allocations - were chased out or killed. Soy and others who were seen to be benefiting from the land allocations, or who criticized the land reform aims of the SLDF, also became victims.

42. Second, as the SLDF increased its control over villages in the Mt Elgon region, anyone living in those areas who failed to follow SLDF rules or orders was punished commonly through having an ear cut off. Residents who refused to “donate” food or pay levies were beaten or killed. The SLDF used “informers” within the villages, and those who were believed to have divulged information to the police were killed. Such SLDF killings could take place anywhere, but typically took place at designated areas in the forests, where the victims’ bodies were often just left on the ground surface, with previous victims.

43. Third, some killings were politically motivated. The members of the Mt Elgon District Security and Intelligence Committee (DSIC) acknowledged that the SLDF began and operated with political backing. The SLDF supported the candidacy of Fred Kapondi in the 2007 elections, and for each ward, the SLDF had its favoured candidate, based on that candidate’s support for the land reallocations that the SLDF wanted. Supporters of rival parties, and especially of John Serut, who was running against Kapondi, were targeted by the SLDF.

44. Over 700 killings and 120 disappearances by the SLDF have to date been individually documented by local organisations; although this is likely a fraction of the total number.

C. Two years of insufficient Government action

45. The Government did far too little to protect civilians during what the District Commissioner for Mt Elgon district called this period of “total terror”. Inaction was not due to a lack of knowledge about the SLDF’s activities. The Mt Elgon DSIC informed me that they sent monthly minutes to the Provincial Security Committee, asking for security reinforcements to counter the SLDF, and stating that the security situation was “out of hand”. Local and international civil society and humanitarian organisations repeatedly called for action against the SLDF. But their requests were largely ignored. Within Mt Elgon, local police all too often looked the other way in exchange for payments from the SLDF.

46 Appendix II: Case 14, Case 20.

47 Appendix II: Case 16, Case 26.

48 Appendix II: Case 18.

49 Appendix II: Case 15, Case 19, Case 21.

50 See also: Office of the Government Spokesman, “President Kibaki Gives Directives on Mt Elgon” (4 April 2007) (stating that “President Mwai Kibaki has been concerned about the occurrences and continued insecurity in Mt. Elgon for a long time and has been closely monitoring the situation.”).
46. The Provincial Government did launch a small operation called Tafuta Amani (“Seeking Peace”). But it had little effect. As a result, during the 2006-2008 period, many civilians were effectively caught between the police and the SLDF, and villages would be attacked by both sides.

47. The only explanation proffered by observers to explain the Government’s failure to send real security reinforcements before 2008 was that it did not want to intervene before the 2007 general elections.

D. Joint military-police operation (2008)

48. The Government finally launched a major joint military-police operation on 10 March 2008. The Mt Elgon DSIC informed me that Operation Okoa Maisha (Save Lives) was composed of a military detachment, Kenyan Police, the General Service Unit, the Administration Police, and the Anti-Stock Theft police. The DSIC stated that it was composed of about 400 security force members, including 120 from the military (the 20 Para Battalion). The Chief of General Staff and the Assistant Minister for Defence stated that they deployed approximately 300 soldiers from two companies (the Alpha Company of the First Kenya Rifles, and the Alpha Company of the 20 Para Battalion).

49. The police have consistently stated that the military were asked to “assist” the police operation, and were involved in “logistics” only. The Mt Elgon DSIC told me that the operation was directed by the Western Province Provincial Police Officer, and that he directed both the police and the military. They said that the police were responsible for arrests and interrogations. The military involvement was to provide vehicles (to transport suspects), and to help cordon areas in which the police carried out arrests. The DSIC stated that 13 people were killed during the operation, due to “cross-fire”, and that the operation netted over 100 assorted weapons.

50. My meeting with military officials in Nairobi provided a somewhat different account. The Chief of General Staff stated that they divided Mt Elgon into two operational areas. The upper area - the forested area where most of the SLDF were hiding - was where the military primarily operated, with minimal police input. Military officials stated that they mounted ground operations to find the SLDF forest camps, and arrest members. They said that they met little overall organized resistance, but that during fighting eight suspected SLDF members were killed. The lower area was the inhabited area, and, according to the military, operations there were primarily conducted by the police with minimal military presence.

51. Once suspects were detained, they were mostly taken to Kapkota - a temporary security force “base” that was used as a screening center. There, detained persons were interrogated as to their connections to, or knowledge about, the SLDF. Informants were extensively used at Kapkota to identify SLDF members. The Mt Elgon DSIC stated that 3,265 individuals were detained at Kapkota military camp: 2,187 were released after questioning, and 1,078 were arraigned in court. According to records provided to me by the military, 3,839 individuals were “screened” at Kapkota.

51 See appendix II: Case 26.
E. Abuses by security forces

52. Detailed reports by a wide range of credible observers estimate that hundreds of men were tortured and killed in the 2008 operation by the Government’s security forces. Before I visited Mt Elgon, I was able to study the comprehensive reporting on abuses by the Western Kenya Human Rights Watch (WKHRW), the KNCHR, the Independent Medico-Legal Unit (IMLU), Medecins sans frontieres (MSF), and Human Rights Watch (HRW).\(^{52}\) The number of persons killed or disappeared by the security forces is conservatively estimated at over 200.

53. I received detailed and credible reports from witnesses and victims that abuses by the security forces happened throughout the various stages of the operation. A significant number of detained persons were beaten at the time of first contact with authorities - when they were detained either in the village cordonning process, or individually targeted for detention.\(^{53}\) At this point, they were beaten in a comparatively unstructured or sporadic fashion. They would be repeatedly kicked or hit with implements by security forces. At Kapkota, witness testimony indicates that they were tortured in a significantly more planned and controlled manner. They were frequently stripped naked, kicked, beaten on the genitals, forced to repeatedly jump up and down, forced to lie in the sun for long periods, and detainees were forced to beat each other.\(^{54}\) Unsurprisingly, these beatings led to a large number of deaths.\(^{55}\)

54. The bodies were either taken to mortuaries, or dumped in the forests. There remain a large number of missing persons, last seen in security force custody, and presumed dead.\(^{56}\) The only real assistance family members have received in finding their disappeared relatives have come from civil society and humanitarian organizations.

F. Official responses to allegations of abuse

55. I asked Government officials, and police and military officials for their response to the various allegations of abuses by the police and the military. I received a range of wholly unsatisfactory denials.


\(^{53}\) Appendix II: Case 22, Case 25, Case 26, Case 28.

\(^{54}\) Appendix II: Case 22, Case 24.

\(^{55}\) Appendix II: Case 22, Case 25.

\(^{56}\) Appendix II: Case 22, Case 23, Case 26, Case 27, Case 28.
56. Some officials attempted to deny altogether knowledge of the allegations put by NGOs. When I asked the District Security Committee in Mt Elgon for their response to NGO reports of abuses, some members stated that they were not aware of their documentation of torture or unlawful killings. Some members then stated that they were aware of (but had not read) the reports. They also had not read the report prepared by the parliamentary committees on Administration and National Security, and Defence and Foreign Relations, which found that “there are cases of human rights abuses by the security forces”. It recommended that such cases be further investigated. Unfortunately, no such action has been taken.

57. Other officials told me that the various NGOs were biased. I was told that they had only documented abuses by the security forces, and failed to acknowledge or properly document SLDF abuses. As a factual matter, this claim is simply untrue. The HRW report on Mt Elgon, for example, contains substantial sections on abuses by the SLDF and by the security forces, and addresses responsibility for both sets of abuses. The WKHRW has extensively recorded individual human rights abuses by the SLDF. In any event, an NGO report about abuses by a Government operation are not irrelevant because it does not also extensively report on the prior violations of non-state actors. The primary responsibility for monitoring and responding to abuses by criminal gangs or militias rests with the Government. Insofar as a Government fails in these responsibilities, NGOs will often take up a monitoring role. This of course explains the extensive involvement of NGOs in monitoring SLDF abuses during the two-year period that the Government largely ignored the violence. But it is also the case that, by 2008 at least, the abuses by the SLDF were well-known and acknowledged by the Government. What was less clear, and in need of serious investigation in 2008 was the nature of the Government’s security operation. Allegations had been made of abuses by Government forces. The Government denied these allegations. This gave rise to a need to investigate in detail and report on the security force abuses.

58. Officials also responded by citing the results of a police inquiry into the Mt Elgon violence, which concluded that, “the alleged reports on torture were found to be unreliable, misleading, obnoxious, unsubstantiated and made in bad faith.” I have studied this report very closely, and my team met extensively with the police responsible for its preparation. It is a whitewash. The investigation they conducted was superficial and misdirected. Insofar as witnesses were named in NGO reports, the police attempted to find them by going to their villages. Most of them could not be found, or refused to speak with the police. The police also asked NGOs to provide the names and locations of those who had alleged abuses by the security forces. Out of appropriate concern for the safety of witnesses and victims, NGOs refused to do this. The police were thus largely left without witnesses willing to speak with them. From this, the police simply concluded that the allegations of abuse were baseless. The police report fails to


58 See Human Rights Watch, “All the Men Have Gone: War Crimes in Kenya’s Mt Elgon Conflict” (2008) (pages 13-26 address the formation and command of the SLDF and other militias in Mt Elgon, and SLDF abuses; pages 27-38 address abuses by the security forces).

acknowledge that a victim of police abuse would reasonably be fearful of reporting that abuse to the police. The report also claimed that civil society and humanitarian organisations, including the International Committee of the Red Cross, “lack investigation ability, mandate, expertise and capacity.” The report does not substantiate this claim, and in fact noted that an ICRC report required “further thorough inquiry” because of its serious allegations of torture and extrajudicial executions. Further, while senior officials sought to impugn the reputation of the WKHRW, police who had actually met and worked with WKHRW stated that their reporting was “very balanced”, “credible”, and “not biased”. These police did not want to be identified because they feared recriminations from police headquarters.

59. In response to my query about military involvement in abuses, I was informed by military officials that most civilians are not able to tell the difference between police and military officers during such operations because their uniforms are so similar. This is likely true. The inability of victims to identify perpetrators was hindered by the practice, confirmed to me by many witnesses and also by the District Commissioner of Mt Elgon, of the security forces failing to wear or display any form of individual identification on their uniforms. Nevertheless, I was provided with credible information, including from citizen informants who worked directly with the military to capture the SLDF, that members of the army were involved in abuses.

60. The military also told me of one case in which a person who instituted a legal action against the military for torture had subsequently retracted his allegation, and asserted instead that he had been beaten by his neighbours and saved by members of the army. According to an undated affidavit allegedly prepared by this individual and provided to me by the military, the individual claims that NGO representatives paid him to allege that the abuses were committed by the military. In light of the campaign of reputation-smearing and intimidation that security officials have embarked on in response to NGO work, there are strong reasons to be skeptical about the authenticity and consensual nature of the individual’s alleged “retraction”. Nevertheless, if the retraction is true, this would vindicate the military in this particular case. But it is no basis upon which to extrapolate and draw the conclusion that all allegations are unfounded.

61. Finally, military officials suggested that witness accounts I received of abuses may be fabrications by SLDF sympathisers. Given the intimidation and threats that are meted out to those who speak out against security force abuses, it is unclear why so many individuals would put their personal and family safety on the line in this manner. In any event, I certainly spoke with those who had been SLDF members and sympathisers. From them, I obtained extensive information on the two years of abuses committed by the SLDF. But I also spoke with many people who were victims of SLDF violence, and who actually offered their services to the police and military to help track down the SLDF. These are not people with a pre-existing bias against the police or military. They wanted the security forces to come and restore order in Mt Elgon. They did not want to have their relatives and neighbors tortured and killed in the process.

60 Appendix II: Case 28.
G. Independent investigations and reform

62. In light of the sheer quantity and quality of the evidence of serious wrongdoing, the Mt Elgon events must be independently investigated. Given the official responses to the allegations, it is clear that a credible investigation cannot be conducted either by the police or the military. Reports on tactics used in other security operations (in El Wak and Mandera) give cause for concern that the security force tactics employed in Mt Elgon have been employed elsewhere, and increase the need for independent investigations. An independent commission, with powers and composition modeled on the Waki Commission, should be immediately established. Its mandate should include abuses by the SLDF (including the role of officials in supporting the SLDF), abuses by the police and the military, and the reasons for the lengthy delay in Government intervention to stop the SLDF. Until such an investigation is undertaken, the military units deployed to Mt Elgon should be barred from participating in UN or African Union peace-keeping operations.

63. Independent forensic analysis of mass graves in Mt Elgon should also take place. In the forests of Mt Elgon there are mass graves and sites where bodies were simply dumped on the forest floor. It is likely that both victims of the SLDF and the security forces are contained in those sites. Government authorities have made no systematic or transparent attempts to protect these sites or have them examined by independent forensic experts. NGOs who have attempted to study the sites have received veiled threats and been prevented from doing so. The District Commissioner for Mt Elgon assured me that future attempts to study those sites would not be obstructed, and the Government should ensure that access is unimpeded.

64. Without a fair allocation of land in Mt Elgon, there is a strong likelihood of renewed violence. Many remain landless and homeless, and the underlying causes of the formation and growth of the SLDF have not been addressed. The Government should ensure that renewed re-allocation efforts are not accompanied by the same favouritism and corruption that defined previous allocations.

IV. EXTRAJUDICIAL EXECUTIONS DURING THE POST-ELECTION VIOLENCE

65. Despite the exceedingly well-documented nature of the grave abuses that occurred in Kenya in the wake of the 27 December 2007 general election, no concrete steps have yet been taken to prosecute the perpetrators, and especially those perpetrators with the greatest responsibility for abuses. This is not because of a lack of available evidence. Significant amounts of investigative work have now been carried out.

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A. The Waki Commission

66. Key among these investigative efforts have been those of the Waki Commission, established by the Government of Kenya to investigate the post-election violence (PEV).62 Kenya deserves much credit for establishing what was, in many respects, a model commission of inquiry.63 The Waki Commission produced a comprehensive 518 page report. The Commission found that 1,113 people were killed during the PEV. Those provinces with the highest levels of violence were the Rift Valley, Nyanza, and Nairobi; with 744, 134 and 125 deaths, respectively.

67. The report records both spontaneous and organized violence. In terms of failures by state actors, the Waki Commission found that officials failed to act on intelligence regarding potential violence; failed to respond adequately to violence; and that police lacked discipline and impartiality, and used unjustified force in responding to post-election demonstrations and violence. Shockingly, police were responsible for 405 deaths (35.7% of the total). In Nyanza, 79.9% of the PEV deaths were caused by police. The report also identified specific individuals from political parties who should be prosecuted for crimes relating to the PEV. The Commission recommended that a Special Tribunal should be created to investigate and prosecute those persons. And it recommended that, if the Special Tribunal is not established, the Prosecutor for the International Criminal Court should be provided the list of names.

B. Failure of accountability

68. At the time of this report, initial efforts to create the Special Tribunal had been defeated. It is unclear whether the will exists to establish it. Kenya cannot afford to let the Waki Commission report achieve little more than recording abuses. Election related violence also occurred in 1992 and 1997. Despite the Akiwumi Commission and the Kiliku Committee reports documenting in

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63 The Waki Commission had a clearly defined but sufficiently wide mandate. Independent and expert commission members were appointed, and staff with specialized expertise were hired. International commissioners and staff were brought in to maximize impartiality, and no serving members of the state security forces were permitted to apply for Commission positions. The Commission had the power to summon any person to testify and to produce any documents. Despite these many positive aspects, the Commission did encounter obstacles. While it could hold private hearings to protect witness identity, it did not have a comprehensive witness protection program. And, some Government officials interviewed were slow in producing requested documents or did not produce the proper materials.
detail those periods of violence and naming the perpetrators, no officials were ever punished for their role in the violence. It is essential that prosecutions take place to provide justice to victims, and to address impunity before the next general elections.

69. Without the special mechanisms recommended by the Waki Commission, there is little prospect for accountability. This was made clear during my investigations into the post-election violence, which I focused on Eldoret (Rift Valley Province) and Kisumu (Nyanza Province).

70. The town of Eldoret in the Rift Valley was one of the first sites of post-election violence, with attacks initially directed at the Kikuyu population. Much of the anti-Kikuyu violence appears to have been intended to push them out of the province: many were threatened and told to leave the area, and their homes and businesses were destroyed. Attackers formed groups of fifteen plus individuals, and specifically targeted Kikuyu homes or villages. Other groups patrolled public areas, and used ID cards to identify Kikuyu persons. In some areas, significantly larger groups (of up to 2,000) formed - armed with machetes, bows and arrows, projectiles filled with petrol - and created road blocks and carried out large-scale attacks.

71. Provincial level officials in the Rift Valley were largely in denial about the findings of the Waki Commission. The Commission found that police planning was scant, and that they were “poorly prepared”. When I asked the officials for their response to this, they admitted that they could not handle the violence that erupted, but argued nevertheless that they were prepared. Worryingly, they stated that there had been no serious changes to policing or planning in response to the PEV. In terms of accountability, I was assured that many PEV complaints had been registered, and that they were at various stages of the criminal justice system. When I asked about police conduct, I was first told that no inquests into police misconduct had been opened, and that no complaints had been received. I was subsequently told that there had been some cases, and that the information would be provided to me. It never was.

72. In Nyanza, I attempted to find out what investigations had been conducted by police into the many reports of police killings committed during the PEV. The Waki Commission found that the police indiscriminately used live ammunition, and that over half of the gunshot victims had wounds from the back (calling into question what threat to life they could have presented at the time of the shooting). Nyanza provincial police officials said to me that they had recorded 82 cases of individuals killed by bullet wounds during the PEV. When I asked them for information about the progress of these investigations, and for their assessment of the appropriateness of the use of force in each case, they were able to tell me nothing, beyond the basic fact that they had conducted investigations, and that 60 files had been sent to the Attorney-General for assessment. In comparison, they showed me extensive documentary

64 The well-known church massacre in Kiambaa (a small town near Eldoret) is one example of the egregious nature of these attacks. See Appendix II: Case 29, Case 31, Case 33, Case 36.

65 Appendix II: Case 32.

66 For individual cases of police shootings, see Appendix II: Case 37, Case 38, Case 39, Case 40. In none of these cases did the police follow-up with the complainants.
evidence of the looting that occurred in the PEV period. After my visit, I was provided additional materials by the Attorney-General, which indicated that one trial was currently on-going of a police officer who shot and killed two youths following riots in Kisumu.

73. At the direction of the Attorney-General, the Director of Public Prosecutions created a team of State Counsels to undertake a review of all 2007 post election violence cases, together with officers from the Criminal Investigations Division.\textsuperscript{67} The team was to determine whether there was sufficient evidence in support of the charges, and recommend whether the case should proceed to trial or be withdrawn. The team found that inquest files in “all the affected provinces” were “far from complete”.\textsuperscript{68} Their report notes that, across Kenya, “considering the high number of deaths reported there should have been more inquest files opened or murder files forwarded”.\textsuperscript{69} Of 51 files of deaths in Nyanza received by the team, 44 files related to killings by police. Of those, 42 files were returned to the police for further investigations. The counsel review notes that the types of evidence missing from the files included such basic evidence as: eye witness statements, ballistics evidence, and statements from police officers involved in the operation. With respect to the Rift Valley, they found that “a very high number of cases” required further investigations. Most Rift Valley files only contained the statement of the complainant, with no further investigations whatsoever.\textsuperscript{70} This report is clearly a damning indictment of investigations, and strongly suggests that serious prosecutions of police and officials are unlikely to take place within the criminal justice system.

C. Complementary measures: the Special Tribunal and the International Criminal Court

74. Discussion, especially in Kenya’s Parliament, about how to achieve accountability in light of the failures in the current system has tended to be presented as a choice between the Special Tribunal and the ICC. This contributed to the defeat of the Special Tribunal proposal in January 2009. Some felt that only an international tribunal could provide the needed accountability and so voted against a local tribunal. But for those who genuinely want to end impunity, the approaches should not be treated as mutually exclusive. A domestic tribunal is essential to address a large number of perpetrators, and to promote national ownership of accountability. But until an effective Special Tribunal is established, the Prosecutor for the ICC should undertake investigations. Given the evidence already available, the ICC would be able to move quickly. While an international tribunal is clearly designed to try only a small number of the most serious offenders, the extent of abuses during the PEV, their recent occurrence, and the

\textsuperscript{67} “A Report to the Hon. Attorney-General by the Team on the Review of Post Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces” (February, 2009).

\textsuperscript{68} Review team report, p. 40.

\textsuperscript{69} Review team report, p. 40.

\textsuperscript{70} Review team report, p. 40.
certainty of further violence at the next elections in the absence of accountability makes this a critical case for the Prosecutor to take up.

V. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

75. The KNCHR, Kenya’s national statutory human rights institution has the authority to investigate complaints of human rights violations. It is a highly professional organization of committed and skilled staff. In the absence of other well-functioning accountability mechanisms, it has played a critical role in bringing to light serious human rights issues. Yet its legitimacy is questioned by officials, and especially by the police, every time it issues a report. Its carefully researched reports rarely draw a substantive response. Instead, officials opt to attack its mandate, credibility or expertise, and the police accuse its members of being in the pay of the Mungiki.

VI. INTIMIDATION OF HUMAN RIGHTS DEFENDERS

76. Human rights defenders (HRDs) were intimidated, harassed and threatened in a systematic manner by Government and security force officials during and after my visit (see Appendix III). Intimidation was particularly severe in Mt Elgon, but took place in Nairobi and elsewhere. As a result, a large number of HRDs have been forced to go into hiding or exile. The intimidation was clearly designed to silence individual activists, prevent civil society investigations of abuses, and to instill widespread fear amongst civil society organizations.

77. Those who have control over the security forces - including the President, the Defence Minister, and the Internal Security Minister - have offered no substantive response to the complaints issued by myself and the United Nations about this intimidation. They have issued no public statements acknowledging harassment, and have taken no measures to hold to account those responsible or to protect threatened activists. The Human Rights Council ignores this contempt for its Special Procedures system at its peril.

VII. WITNESS PROTECTION

78. In the Kenyan context - where many potential witnesses are justifiably afraid that testifying will lead to reprisals - an effective and reliable witness protection program is a necessary component of efforts to fight impunity. It will be one of the most vital factors in the success or otherwise of attempts to prosecute those accused of offences during the PEV, in Mt Elgon, and in relation to police killings. Without a trusted and well-functioning witness protection program, many people will simply be unwilling to testify, and there will consequently be insufficient

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72 See Press Statement, “Allegations by KNHRC”, 24 February 2009 (EK Kiraithe, for Commissioner of Police). (“Our detectives started investigating information to the effect that some officers from the KNHRC have been regularly receiving payments from the outlawed Mungiki sect followers. Kenyans must ask themselves the services the Mungiki is paying for.”).

73 See Appendix II: Case 5, Case 9, Case 10, Case 13, Case 22, Case 25, Case 28.
evidence to prosecute. And without protection, far too many of those who do testify will be putting their lives at risk.

79. A number of important steps have recently been taken to set up a witness protection program. In September 2008, a witness protection law came into effect.\textsuperscript{74} The Attorney-General promulgated regulations pursuant to the Act in December 2008, and began the process of setting up a Witness Protection Unit in his office.\textsuperscript{75} But to date, witness protection exists on paper only: the Director of Public Prosecutions informed me that the unit has not yet provided protection to any witness.

80. The current design of the program is also likely to lead to significant problems in the Kenyan context. The Attorney-General is provided the “sole responsibility” to decide whether to include a witness in the witness protection program.\textsuperscript{76} The set-up of this program can be expected to work well where witnesses are testifying against private actors or criminal organizations. But this expectation is unlikely to hold true where witness testimony implicates police and Government officials. In light of the history of impunity and intimidation, witnesses and civil society justifiably have little faith in a program that entrusts their safety to the very system they fear.

VIII. COMPENSATION

81. The families of victims unlawfully killed have little redress. Throughout the country, I met children and widows whose parents or husbands had been murdered. The family members have been left with few avenues to obtain sufficient funds to meet even basic necessities such as housing, food, and school fees. The Government should ensure that compensation is paid to the families of victims.

82. There is a one-year statute of limitations period for claims in tort against government officials. Given the factual complexity of many cases, the difficulties in accessing lawyers for many Kenyans, and the widespread displacement that the post-election violence caused, the limitation period has prevented many families of victims of the PEV from bringing civil suits against police or other officials. The DPP acknowledged that this was a problem. For unlawful killings and other serious abuses, the one-year limitation period should be removed.

IX. THE DEATH PENALTY

83. Kenya has had a moratorium on carrying out the death penalty since 1987. However, the death sentence continues to be handed down on a regular basis, and in a manner that violates international law. International law prohibits the mandatory death penalty, and requires

\textsuperscript{74} The Witness Protection Act, 2006. (Commenced 1 September 2008: see Gazette Notice No. 110 of 2008).

\textsuperscript{75} The Witness Protection Regulations, 2008. The Government allocated 20 million shillings this year for the program.

\textsuperscript{76} The Witness Protection Act, 2006, s 5.
individualized sentencing to prevent the arbitrary deprivation of life.\textsuperscript{77} International law also strictly limits the crimes for which the death penalty can be applied to cases where it can be shown that there was an intention to kill which resulted in the loss of life.\textsuperscript{78} Further, the death penalty is unlawful where it follows a trial that violates basic due process guarantees.\textsuperscript{79}

84. However, Kenya has the mandatory death penalty for treason, murder, robbery with violence, and attempted robbery with violence.\textsuperscript{80} The provision of the death penalty for robbery with violence is particularly concerning: the elements of the crime create a low threshold for conviction, robbery is very common, and there are many thousands convicted each year. In the period 2004-2007, 15,265 people were convicted of robbery with violence. There is no legal aid for those charged with robbery with violence, and only limited legal aid is provided for those charged with murder. In practice, this means that individuals face a death sentence often without the assistance of legal counsel. The high levels of corruption in the judiciary further call into serious question the fairness of trials.

X. RECOMMENDATIONS

A. Killings by police

85. The President should publicly acknowledge his commitment to ending unlawful killings by the police. To this end:

(a) The Police Commissioner should be replaced immediately;

(b) Unambiguous public orders should be issued that under no circumstances will unlawful killings by the security forces be tolerated.

86. Police death squad killings should be prevented, investigated, and punished:

(a) The Minister for Internal Security should order the disbandment of all death squads, and report to Parliament on the measures he has taken to ensure that the squads no longer operate;

(b) The Government should establish an independent inquiry into the operation of police death squads. To secure the inquiry’s integrity and independence, Kenya should invite foreign police investigators (such as the FBI, or Scotland Yard) to assist. The

\textsuperscript{77} See A/HRC/420, paras. 54-62.

\textsuperscript{78} See A/HRC/420, paras. 39-53.

\textsuperscript{79} ICCPR, Arts 6, 14.

\textsuperscript{80} See ss 40, 203-204, 295-297, Penal Code of Kenya. “Robbery with violence” is defined as: robbery of a person, with one of the following elements: the crime was committed with another person, or the criminal was armed with a weapon, or physical violence to any person was caused (ss 295-296).
inquiry’s work should begin by investigating the detailed allegations contained in reports of the KNCHR, and in the testimony of the police whistleblower. It should report its findings to Parliament, and be empowered to provide evidence and names for criminal prosecution to the Government;

(c) All individuals under investigation for their involvement in police death squads should be removed from active duty during that period.

87. A review of the use of force provisions in the Constitution of Kenya, the Police Act, and the Standing Force Orders should be undertaken to bring them into line with Kenya’s obligations under international law.

88. Across-the-board vetting of the current police is necessary. This needs to be part of a comprehensive reform of the police, including the creation of a Police Service Commission, as recommended by the Waki Commission.

89. The Government should ensure that its expressed commitment to centralize the records of police killings at police headquarters in Nairobi is implemented. All police stations should be required to report such cases to headquarters within 24 hours. The complete statistics of police killings should be made public by the police headquarters on a monthly basis, and the past records of police killings should be made publicly accessible.

B. Killings by the Mungiki

90. The Mungiki should immediately cease their harassment, abuse, and murder of Kenyans.

91. The Mungiki political leadership should publicly condemn killings and other abuses by their members, and take action to prevent all such crimes.

C. Accountability for police killings

92. Internal and external accountability for police should be improved through the following institutional reforms:

(a) An internal affairs division should be created within the police force, with an element of autonomy from senior management, composed of police who are specially tasked to investigate complaints against the police;

(b) An independent civilian police oversight body with sufficient resources and power to investigate and institute prosecutions against police responsible for abuses should be established by Act of Parliament, in line with Waki Commission recommendation 2 for the police.

D. Criminal justice system

93. The Attorney-General should resign. This is necessary to restore public trust in the office, and to end its role in promoting impunity.
94. Political control over prosecutions should be eliminated and the prosecutorial powers currently held by the Attorney-General should be vested in an independent Department of Public Prosecutions.

95. To reduce corruption and incompetence in the judiciary:

   (a) Radical surgery needs to be undertaken to terminate the tenure of the majority of the existing judges and replace them with competent and non-corrupt appointees;

   (b) Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;

   (c) The Judicial Service Commission should be reformed so that its membership is representative; and its role in appointments, discipline and dismissal of judicial officers be clarified and strengthened;

   (d) The Judicial Service Commission should create a complaints procedure on judicial conduct.

E. Accountability for post-election violence

96. Parliament should establish a constitutionally entrenched Special Tribunal, as recommended by the Waki Commission.

97. The prosecutor of the ICC should immediately undertake, of his own volition, an investigation into the commission of crimes against humanity by certain individuals in the aftermath of the 2007 elections.

98. Investigations and prosecutions within the regular criminal justice system should also continue. The Office of Attorney-General should publicly report within one month following the publication of this report, and in six month intervals thereafter, on the progress of investigations and prosecutions of post-election related violence.

F. Killings in Mt. Elgon

99. The Government should immediately set up an independent commission for Mt Elgon, modeled on the Waki Commission, to investigate human rights abuses during the period 2005-2008. The mandate of the commission should include abuses by the SLDF (including the role of officials in supporting the SLDF), abuses by the police and the military, and the reasons for the lengthy delay in Government intervention to stop the SLDF. Independent forensic analysis of the mass graves in Mt Elgon should also take place.

100. The Government should make available to the ICRC and the KNHRC, with assurances of appropriate confidentiality, the names of all those detained at Kapkota military camp, along with photographic and other documentary evidence of the detention and screening regime. This would facilitate the quest to resolve disappearances and enable a thorough accounting to be undertaken.
101. The Government should provide funding and other assistance to the families of those who remain disappeared following the police-military intervention.

102. The Government should ensure that evidence of killings, and especially the mass graves in Mt Elgon, is not destroyed. Civil society should not be prevented from visiting these sites.

103. In light of the seriousness of the allegations against the military, the units deployed to Mt Elgon should be barred from participating in UN or African Union peace-keeping operations until independent investigations have taken place. Those found to have committed abuses or to have command responsibility for abuses should be prosecuted and dismissed from the military.

104. These measures should be encouraged and supported by the international community, and particularly those countries providing military aid to Kenya.

G. Witness protection

105. A well-funded witness protection program that is institutionally independent from the security forces and from the Office of the Attorney-General should be created as a matter of urgency.

106. The international community should continue to support Kenya’s efforts to create an effective witness protection program.

H. Compensation and civil redress

107. The Government should ensure that compensation is provided to the families of those victims unlawfully killed by the police or other security forces.

108. For unlawful killings and other serious human rights abuses, the one-year statutory limitation period on suits in tort against public officials should be removed.

I. Kenya National Commission on Human Rights

109. Police officials should cease their frequent accusations that KNCHR staff are paid by or work with criminal organizations. If the police have evidence of criminal behaviour by any person, such persons should be investigated, charged and prosecuted according to regular procedure.

110. Reports by the KNCHR should be tabled in Parliament as soon as practicable after they are presented to the Minister for Justice. The Government should provide a substantive response within a reasonable time period to all KNCHR reports.
J. Intimidation of human rights defenders

111. The Government of Kenya should immediately issue instructions to the police, the military, and district and provincial officials to cease and desist from acts of intimidation and harassment of human rights defenders. The text of these instructions should be made public.

112. The Government should ensure that independent investigations take place to determine who was responsible for carrying out and ordering the intimidation.

113. The Government should accept international offers to provide criminal investigation assistance to identify those responsible for the 5 March 2009 killings of two prominent human rights defenders from the Oscar Foundation Free Legal Aid Clinic, Mr Oscar Kamau Kingara and Mr John Paul Oulu.

114. The Government should report, publicly and to the UN High Commissioner for Human Rights, within 3 months following the publication of this report, on the steps it is taking to prevent and prosecute intimidation of human rights defenders.

K. The death penalty

115. Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction.
Appendix I

PROGRAMME OF THE VISIT

1. I visited Kenya at the invitation of the Government from 16-25 February 2009. I travelled to Nairobi, Rift Valley Province (Nakuru, Eldoret and Kiambaa), Western Province (Bungoma and Kapsokwony), Nyanza Province (Kisumu), and Central Province (Nyeri).

2. From the Government of Kenya, I met with officials at all levels, including: the Prime Minister; the Minister and the Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs; the Assistant Minister and the Permanent Secretary in the Ministry of Defence; the Permanent Secretary in the Ministry of State for Provincial Administration and Internal Security; the Chief of Staff of the Kenyan Armed Forces; the Commissioner of Police, and police from the General Service Unit, the Administration Police, and the Criminal Investigations Department; members of the National Security Intelligence Service; the Public Complaints Standing Committee; the Police Oversight Board; the Director of Public Prosecutions; the Chief Justice and Registrar of the High Court; the Chairs and members of parliamentary committees on international affairs, internal security, justice, and outlawed organizations; the Provincial Commissioners and Provincial Security and Intelligence Committees for the Rift Valley, Nyanza and Central provinces; and the District Commissioners and District Security and Intelligence Committees for Uasin Gishu District (Rift Valley Province) and Mount Elgon District (Western Province). Subsequent to my visit, I was provided additional information from the Government of Kenya, including from the Attorney-General, the defence forces, and the police.

3. I met with a large number of representatives of the diplomatic community.

4. I spoke with many representatives from international, national and local civil society organizations. I also met with the commissioners and staff of the Kenya National Commission on Human Rights.

5. Before I visited Kenya, I was able to analyse in detail the many reports prepared on human rights issues in Kenya, including reports by the Government, parliamentary committees, commissions of inquiry, police, and international, national and local civil society organisations.

6. My team and I conducted over 100 individual interviews with victims, witnesses, and family members of victims of human rights abuses. They included victims of and witnesses to militia and gang violence, criminal violence, and police and military violence.

7. I also met with the UN Resident Coordinator, his Senior Human Rights Advisor and representatives from many UN agencies present in Kenya. I am grateful to the Resident Coordinator’s Office for facilitating my mission.
Appendix II

SELECTED CASES

In this report I have taken particular caution in naming and identifying victims and witnesses. Most witnesses did not want their names or other identifying material made public in any way, or provided to the Government, even in confidence. Many of those with whom I spoke claimed to live in fear of the Government’s security forces and felt that exposing their identities would open them up to (further) intimidation or worse. The very serious instances of intimidation against those who testified before me - detailed in section VI and Appendix III of this report - which took place both during and after my visit indicate clearly that such fears are warranted. For this reason, although my team and I conducted over 100 lengthy witness interviews, only a small number of individual cases containing identifying information are referred to in this report. In most of the selected cases summarized below, significant identifying material has been withheld to protect the witnesses and their families.

Case 1: Dr. James Nganga Kariuki Muiruri (29 years old) was killed on 24 January 2009. He had a law degree, a master’s degree, and had just completed a PhD, all from universities in the UK. While visiting his family in Nairobi, he went out one night with his brother. Following a disagreement at a hotel, on their way home, their vehicle was blocked by two other cars. James got out of the car, and was harassed by the passengers from the other vehicles. One ordered James to handcuff himself. When he asked why, James was fatally shot. The assailants drove off. Subsequently, a police officer reported that he had shot a “bank robber” and “Mungiki member”. When it became known to the police that James’ brother was a witness to the event, that James’ father was a well-known former member of Parliament, and that James was a respected scholar, they claimed that the officer who shot James was new to the force and “trigger happy”.

Case 2: A group of six people were walking at night in May 2007. The group was taking a young child to hospital for emergency treatment. The group heard what they described as a hail of gunfire and threw themselves to the ground. Shortly thereafter, they were approached by men who identified themselves as police. The police asked why the group was walking at night, and stated that “only bandits walk at night”. The group explained that they had been taking a child to hospital, and the police apologized for firing at them. Their shooting, however, had killed one male adult, a female adult and her 16 month old child. The post-mortem reports for the mother and the child indicated that one bullet killed both of them (the mother was holding the child). Family members made complaints, but there had been no progress on holding the police to account.

Case 3: Benson Mwangi Waraga was a tailor, and photographed by the media while being arrested by police on 17 May 2007. Apparently, the police had entered the tailor’s building in pursuit of suspected criminals. Mr Waraga and his employees were arrested along with a number of other people found in the building. At the police station, Mr Waraga was taken to a separate room from the other detainees and from his employees. His employees were released from custody on 18 May. Mr Waraga’s family unsuccessfully attempted to find him at the police station. On 19 May, they found his body at City Mortuary. (The body was recorded as “unknown”). The family was told by mortuary staff that police had brought the body to the mortuary. A pathologist report states that Mr Waraga died due to “multiple organ injuries due to multiple gunshots” and that the “fatal bullets were shot from behind.” According to the police
whistleblower testimony, the tailor and three other suspects were picked up from the Kamukunji police station, taken to City Park, and shot at 7.00 pm. Firearms were planted on the men. According to family members, they made complaints to the police, but the CID officer they reported to stated that he could not get statements from the officers believed to be responsible because they were his seniors.

**Case 4:** The witness, the mother of the victim, testified that her son was arrested by police while traveling on a matatu in November 2007. The mother went to the police station where her son was being held, and told to pay 30,000 KSH. She was told, “If you do not bring the money by tomorrow, we will kill him, because he is a Mungiki.” The next day, her son was released, despite non-payment by the mother. But a few days later, he was again arrested while traveling on a matatu, in front of a large number of witnesses. The mother has not seen her son since. She was told by CID that there was nothing they could do to help.

**Case 5:** The witness was arrested in August 2007. He paid the police 10,000 KSH, and they let him go with a warning not to say anything to anyone about what occurred.

**Case 6:** In a killing detailed by the police whistleblower, a suspected Mungiki named “Kibe” was arrested at Kariobangi Light Industries roundabout. He was taken to a police station, but instead of being detained in a cell, was interrogated in a police vehicle. He was told to get a bribe for the arresting police officers, and he raised 50,000 Kenyan shillings. When he gave this to the police, they released him. However, two of the officers followed Kibe, with the intent of re-arresting him. According to the police whistleblower, “It was planned in such a way that the relatives won’t suspect these police officers who had previously arrested him. Their argument was that as long as they saw him give bribe and subsequently being released, there is no way these relatives would suspect them to re-arrest him.” The two officers stopped Kibe,-boarded his vehicle, and ordered him to drive to a secluded area (a forest). Four vehicles of police followed Kibe’s vehicle. At the forest, Kibe was strangled with a rope, and beaten with pangas (machetes) and rungus (sticks). After he died, his body was then dragged for some 100 metres behind his vehicle, with the rope that was tied around his neck. He was then untied and left along the roadside.

**Case 7:** On 21 June 2007, Kimani Ruo (an alleged Mungiki leader) was leaving court after charges against him had been dismissed. Various photographs were taken of him by the press, while he was walking out of court. Police officers are amongst those in the photos, walking next to Kimani. Witnesses saw Kimani speaking with police officers. Kimani told one of his acquaintances that he needed to go with the police. He then disappeared. His family and friends searched in police stations, but did not find him. According to the police whistleblower testimony, the members of the special police squad were instructed to go to the Nairobi Law Courts. Once there, they received instructions to detain Kimani. At approximately 12.30 pm, Kimani was told to get in the vehicle being driven by the whistleblower. The whistleblower was instructed to keep the tinted windows of the vehicle rolled up, and to not let Kimani make any calls or leave the vehicle. The whistleblower’s vehicle was subsequently joined by three other vehicles occupied by police officers. They drove to Ngong Forest, where Kimani (along with two other Mungiki suspects brought in the other vehicles) was interrogated, and tortured. The
interrogation was tape recorded, and played back to senior officers over a telephone. Kimani was held overnight, and the next day taken in a convoy of five vehicles to an unoccupied farm area where he was killed with ropes, pangas and rungus. The officers involved were subsequently all given 12,000 KSH by senior officials.

**Case 8:** The mother and wife of a male victim both testified that in 2008 the victim was asked to meet a police inspector at a restaurant. The man was accompanied by his wife and a male friend. As they left, the police inspector made a phone call, and two vehicles drove up to the front of the restaurant. The two men were put into the vehicles, and have not been seen since. The wife and her relatives made complaints to the Provincial Police Officer and the CID, but the case remains unresolved.

**Case 9:** On 9 April 2008, the wife of Maina Njenga (a Mungiki leader currently in prison) and her driver were killed. (Earlier in the year, police had gone to the home of the driver’s parents and told them that the police would kill their children. The police used one of the children to locate the homes of the two brothers they were particularly looking for, one of whom was the driver). A friend of Maina’s wife was on the phone with her the day she was killed. While in her car, Maina’s wife told her friend, “we’re in trouble”. Her phone then disconnected, and remained switched off. Her and the driver’s body were found, mutilated, in a forested area a few days later. According to the police whistleblower, while driving, the two were blocked by three police vehicles, and taken first to Ngong Forest, and then to Machakos District. There, they were killed. The bodies were dumped in Gatundu. Two weeks later, on 28 April 2008, the driver’s brother was shot and killed while driving his car. According to the police whistleblower, he was tracked down and shot by the police. Most of the family members of the three deceased are in hiding, and fear reporting or pursuing the cases because they assume they will also “disappear”.

**Case 10:** A victim was fatally shot 3 times by police. The incident was witnessed by a group of people. But they all refused to give statements to the police for fear that they would suffer reprisals. The wife of the victim was forced to relocate.

**Case 11:** The victim was arrested by police on 30 June 2008 from a bus station. He was photographed by a member of the press while being handcuffed. The victim was put in a police car. A bus driver who knew the victim called the victim’s wife and informed her of what had occurred. The wife, with other members of her family, searched for four days in a large number of police stations. On 6 July, the wife found her husband in the City Mortuary. Records there indicated that her husband had been brought to the mortuary on 1 July by police officers. The husband had been strangled. The wife and her family members made complaints to the police, and believe an inquest file was opened, but nothing has happened since.

**Case 12:** The female witness went to a police station to report that her male relative had been shot in the leg by a stray bullet fired by police. She was seeking compensation for the medical treatment. When she reported the matter, the police were aggressive and denied that the event had taken place.

**Case 13:** The witnesses were family members of a victim who was last seen being arrested by the police. The family attempted to find their relative, but searched in police stations and
mortuaries in vain. Two members of the family, who had been particularly active in looking for their relative, were asked to report to the police station. They then also disappeared, and at the time of my interview with the remaining family members, had not been found. The remaining family members live in fear, and have been forced to relocate.

Case 14: The witness, from Mt Elgon, was forced to join the SLDF in early 2007. The SLDF came to his home and told him that, while he did nothing to secure his land, they were fighting on his behalf in the forest. They forced him to go to the forest with them. His duties in the SLDF camp were to chop firewood and cook for the approximately 300 other members who lived in the camp. While he was with the SLDF in the forest, his wife was abducted and killed by the SLDF because she was a Ndorobo.

Case 15: The witness, a former SLDF member, joined the SLDF voluntarily in 2006. He lost some land in the land allocations, and - together with many other men from his village - joined the SLDF so that they could force the return of their land. He stayed in his village as an “informer” for the SLDF. Members of the SLDF subsequently raped his wife, and the witness fled from the area, and began to assist the police with intelligence about the location and operations of the SLDF. When the joint police-military operation began in March 2008, he provided further information to the security forces. He was provided a camouflage military uniform, and assisted in identifying SLDF members, and locating SLDF forest base camps.

Case 16: The witness, a former SLDF member, initially joined the SLDF voluntarily in 2006. He joined because he was not allocated land during the land allocations, and the land he had been living on was allocated to someone else. One of his neighbours, a senior SLDF member, told the witness about the SLDF and its aims. The witness then joined the SLDF so that he could “fight for [his] land”. At least 20 other men from the witness’s village also joined. They resided in the forests around Mt Elgon. His brother was subsequently murdered by other SLDF members in a dispute over land allocations (the brother had been formally allocated land, and so he was considered by the SLDF to be a collaborator). The witness wanted to leave the SLDF at that point, but believed that if he left, he would be killed.

Case 17: The witness, a former SLDF member, was forced to join in 2006. He left the SLDF after members of the group killed his brother in 2007. The witness formed another small armed group, composed largely of SLDF defectors. This group was subsequently attacked by the SLDF, and some of its members were killed.

Case 18: In February 2008, the SLDF went to the female witnesses house in Mt Elgon at approximately 10 pm. The SLDF shot in the air, and took her family’s cows by force. When her husband attempted to stop them, he was shot. The witness took her husband to the local hospital, but he died the next morning.

Case 19: The witness’s husband was killed by the SLDF in January 2007. In the months before the murder, her husband had frequently invited the police to his house for tea or meals. On the day her husband was shot by the SLDF, the police had come to the victim’s home just hours prior. Her husband was rushed to a nearby health centre, but was pronounced dead on arrival. The witness believed that the circumstances of the killing suggested that the SLDF shot the victim because he was judged to be a “collaborator”.
Case 20: The witness’s husband was taken by the SLDF in late 2007. A group of six SLDF came to the home of the witness and her husband late in the night. The SLDF broke the front door, two of them grabbed the husband by the arms, and took him outside. The SLDF also took two cows owned by the family. The militia members were armed with long knives, and had covered their faces with pieces of cloth so that only their eyes were showing. Most of the homes in the village - occupied primarily by those of Ndorobo ethnicity - were burnt down by the SLDF. The next day, the witness saw a number of bodies in the destroyed village, but did not find her husband.

Case 21: The witness’s brother, a school teacher in Mt Elgon, was close friends with a senior police officer. In October 2007, a large group of SLDF went to the witness’s brother’s home. They killed the brother, and forced the brother’s young son to watch. The SLDF told the son that they were killing his father because he was a “friend to the police”.

Case 22: Three male witnesses were detained by the security forces in March 2008. They were transported in an army truck to Kapkota camp. On the way, a fourth man - who other witnesses had seen being beaten by security officials - died in the vehicle. At Kapkota, the three witnesses were stripped naked. They were told not to look at the security officials, who wore camouflage military fatigues. The detained men were told to jump up and down, and were kicked by security officials. They were also beaten on the genitals. They were “screened” for SLDF membership, a process that involved being taken in turns before a vehicle, and told to call out their names. Detained men were either told to walk to one side of the vehicle and put their clothes on, or walk to the other side. Each of the three witnesses were determined not to be SLDF members. None of them reported to any official the abuse they suffered as they feared further abuse. The family members of the deceased man were never able to find his body. When they attempted to report the death to the police station, the police refused to take the complaint, and told the family to look for the body in the local mortuary.

Case 23: In March 2008, security officials went to the home of the witness in Mt Elgon. They detained her husband. She never saw him again. She searched surrounding police stations, prisons and mortuaries, and checked Kapkota camp. She was told by a teacher who had been detained at Kapkota that her husband had been one of a group who were tortured at the camp. The teacher witnessed the husband being released from custody upon determination that he was not an SLDF member, but collapse and die at the camp. The teacher saw the body covered by tarpaulin by security officials. At the time of the interview with the witness, she still had not found her husband.

Case 24: The witness was arrested at a market in Mt Elgon by security officials in March 2008. He was taken in a military lorry to a small military camp in Mt Elgon. Security officials at the camp removed the witness’s clothes and tortured him. He was then taken to a local police station. The police released him, and the witness’s family took him to a health centre for treatment for his wounds. The witness believes that he was detained because a male relative of his was a prominent public figure, and had been accused of being a member of the SLDF.

Case 25: The witness, a female relative of the victim, was told by a Government official in Mt Elgon that the men in her family were invited to a meeting with the official. Two of her male relatives attended the “meeting”, at which they were beaten by security officials and taken in an
army vehicle to Kapkota camp. There, one of her male relatives received particularly severe torture. The next day, he was taken to Webuye prison. He died in prison that day. The witness found his body in the mortuary the following day. The family of the victim was told by the Government official not to pursue the matter or talk about it.

**Case 26:** The witness lived in Mt Elgon. From mid-2006, the SLDF started coming to her village during the night. They would arrive in large groups, and two or three SLDF members would approach the homes of those they were looking for. Sometimes they would kill, abduct or beat the male head of a household. The SLDF called this “disciplining”, and it was targeted against those who were reported to have criticized the SLDF. In mid-2007, the police started going to her village, to look for SLDF. The police also killed and beat residents. The witness and her relatives fled to another area to escape the SLDF and police operations. In March 2008, a male relative of the witness was arrested from his home by security forces. At the time of arrest, he was beaten with batons. The witness was raped at her home by security officers. The male relative was taken to Kapkota camp. Another male detainee at the camp told the witness that he had seen her male relative beaten at Kapkota, and that he was then left lying on the ground, and died there. The family of the deceased man never found his body.

**Case 27:** In April 2008, seven security force officials and three neighbours went to the home of the witness in Mt Elgon. The witness’s male relative was arrested, put in an army truck, and taken to Kapkota. The witness went to Kapkota the next day, but was told that her relative was being questioned and she was told to go home. The following day, she again went to Kapkota, but she was told to go to the police station. The police told her that her relative had been brought in to the police two days earlier, but that he had been returned to Kapkota. She went to Kapkota again, and was told to go to Bungoma prison. Prison officials stated that her relative was not detained there. She searched in nearby towns, but could not find her relative. She was later told by another male who had been detained in Kapkota that he relative had died there.

**Case 28:** The male witness, from Mt Elgon, was arrested early in the morning in his village by security officials, together with two male relatives, and a group of other men in March 2008. The head of the security officers identified himself as an “Army Major”. The men were ordered to lie down, and the officials beat them. The witness showed the officials his employment card, and he was released. His male relatives were taken to Kapkota. The witness searched for his relatives, but did not find them. In June 2008, the witness went to the police station. He was told not to ask about the relatives again, because, according to the police officer, they were “criminals”.

**Case 29:** Witnesses and victims of the church massacre in Kiambaa (a small town near Eldoret) described being corralled inside the church, and watching their attackers block entrances, and stack mattresses against the church walls. The attackers set fire to the mattresses. Those who managed to escape from the burning church were chased, and when caught, beaten to death. Others were forced back inside the church. One witness described watching as an attacker threw a young child back into the burning church through a window.

**Case 30:** In the Rift Valley, on 31 December 2007 at approximately 4 p.m., the victim was shot in the arm, from the back, while he walked past a group of police officers. He was taken to a health centre by some other people who saw him injured on the street. Civil society groups assisted the victim to make a complaint to the police. At the time of the interview, no outcome of police investigations was known.
Case 31: On 30 December 2007, the witness’s village (primarily Kikuyu) was attacked by a large group of armed youth. The witness and her husband ran from the house, together with many of their neighbours. The attackers started burning their homes. They attacked and killed the witness’s husband with machetes and sticks. She also saw three other people similarly murdered. The witness reported the death of her husband to the police, but has received no notice of any follow-up.

Case 32: Before the elections, the Kikuyu witness was told by Kalenjin colleagues that he should consider leaving the Rift Valley before the voting, because of possible violence. The witness decided to stay, and was walking on 3 January 2008 with two male relatives, and one male friend. They were confronted by a group of approximately ten Kalenjin youths, armed with metal bars and sticks, and asked to produce identification. The group of ten was then joined by another group of approximately thirty. They demanded from the witness and his relatives and friend their valuables. They beat the witness (leading to a broken arm and severe cuts), and beat to death his two relatives. The witness reported the incident to the police, but had received no follow-up and does not expect any.

Case 33: The witness lived in a mixed Kalenjin, Kikuyu, Kisii, Luo village in the Rift Valley. On 31 December 2007, attackers came to her village, were escorted by residents to Kisii and Kikuyu homes, and burnt down those homes. There are now no Kisii or Kikuyu homes left in the village. At the time of the interview, the witness was still living in tents with her son and other relatives.

Case 34: The witness went to visit his mother in a village in the Rift Valley on 29 December 2007. He could not immediately get to her because her village was surrounded and being attacked by a group of 50 + youth, armed with pangas, machetes, and bows and arrows. His mother later died from the injuries inflicted on her during the attack.

Case 35: The witness’s brother was killed during an attack on the witness’s village by a group of 100 + armed youth. The witness and other family members recorded complaints with the police. There has been no follow-up from the police. When they attempted to ask the police what action had been taken, they were told that the post-election violence was an “old story”.

Case 36: The Kikuyu female witness watched as her husband was hacked to death metres in front of her house by a group of men armed with machetes. The witness also saw the attackers kill a small boy at the same time. Approximately eight police were sitting in a car near her home, and did not intervene. When the witness subsequently asked them why they did not stop the attack, they said that it was not their duty. After the killing, the police took the two bodies to the mortuary.

Case 37: The witness, from Nyanza, was shot by police just in front of his home in January 2008, while with his mother and his children. At the time of the shooting, he was sitting and talking with his mother. Medical reports and x-rays showed that he was shot in the lower abdomen. He now has difficulty walking, and his urinary tract functioning has been impaired. The witness believed that he was simply shot recklessly or indiscriminately. He reported the shooting to the police. They took no action, so the witness retained lawyers in mid-2008 to seek compensation.
Case 38: On 28 January 2008, in Nyanza, the male victim was shot in the back of the head by police. The victim worked at a school. In the morning, there was confusion outside the school, and the victim went outside with school guards to assess the situation. He was then shot without warning, and he fell and died instantly. Three witnesses saw the incident. Witnesses believed that the shooting was either an accident or simply reckless. Relatives made a complaint to the police, but the police were hostile. When it became clear to the family that the police were doing little to investigate, they retained a lawyer to institute a civil suit.

Case 39: In late December 2007, an 11 year old girl was fatally shot by police when bullets went through the family’s front door. When the family attempted to make complaints with the police, they were simply told “sorry”. The family had received no follow-up from the police.

Case 40: The male victim was shot from the back on 30 December 2007. He was on a street in an estate, 4-5 kilometres from Kisumu. A group of looters began running up the street, and he started to run with them. He saw one police vehicle, chasing the looters, with police shooting into the air and at looters from the vehicle. The witness was shot, and fell to the ground. He also saw two other men fall, and subsequently die. He made complaints to the police, but never received any follow-up communication.
Appendix III

INTIMIDATION OF HUMAN RIGHTS DEFENDERS

1. Before, during, and after the visit of the Special Rapporteur to Kenya, human rights defenders were systematically intimidated by the police, military, and Government officials.

2. In Mt Elgon, human rights defenders (HRDs) were told not to bring witnesses or victims to meet with the Special Rapporteur. Human Rights defenders were also told not to personally testify before the Special Rapporteur about abuses committed by the police or military. They were told to speak only about abuses by the Sabaot Land Defence Force (SLDF) armed group. HRDs were warned by text message, telephone calls, and in person. In one instance, officials addressed an internally displaced persons (IDP) camp. They told the residents that they should tell the Special Rapporteur about killings by the SLDF, but not about those by the Government. The officials told the IDP camp residents that if they followed these instructions, they would continue to receive food aid from the Government.

3. During the Special Rapporteur’s visit to Mt Elgon, National Security Intelligence Officers unsuccessfully attempted to obtain from NGOs the list of witnesses with whom he was going to meet. Civil society organizations were harassed repeatedly for information about the program and schedule of the Special Rapporteur, and for details of the NGO involvement in the Special Rapporteur’s mission. During meetings, the Special Rapporteur was alerted to the nearby presence of intelligence officers. When these officers were confronted by the Special Rapporteur, they ran away.

4. Subsequent to the Special Rapporteur’s meetings with witnesses, police, military and Government officials went to the homes and workplaces of human rights defenders, in an attempt to obtain lists of those who had testified before the Special Rapporteur. Individuals were told that they would be arrested if they did not hand over the list of names. This led to a number of human rights defenders being forced to flee the area. They were delivered further messages by telephone to “keep away” and “not come back”. Following the Special Rapporteur’s press statement, demonstrations were held in Mt Elgon against NGOs. Individuals were told that they would be denied their food assistance if they did not participate.

5. When the Special Rapporteur was in Kenya, he sought written assurances from the Government that this conduct would cease. In return, he received an official letter which stated that none of the human rights advocates had been threatened. The letter also referred to allegations about the conduct of the HRDs, and indicated that they would be investigated. At the time, this gave rise to even graver concerns about reprisals than he had initially. These concerns were borne out in the following weeks after he left Kenya, as increased numbers of HRDs continued to be intimidated, and were forced to flee or go into hiding.
6. Subsequent to his visit, the intimidation meted out to HRDs in Mt Elgon was extended across Kenya. Advocates in nearly all of the civil society organizations who provided the Special Rapporteur information during his mission received threats. Their work has been severely impeded, many have been required to take extra personal security measures, and others have been forced to go into hiding or exile. Two weeks after his visit, two HRDs - Mr Oscar Kamau Kingara and Mr John Paul Oulu - who worked for the Oscar Foundation, a human rights organisation providing free legal aid services to the poor, were assassinated in their vehicle. The Special Rapporteur met with both men during his fact-finding mission to discuss the issue of killings by police. No one has yet been charged in connection with these murders.

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