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The Role of UN Investigative Mechanism in Anchoring Fairness in the Collaborative Turn of International Criminal Investigations

Emil Wistrand Johansson

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Abstract

Increased solidification of accountability norms in relation to international responses to conflict has led to a collaborative turn where new actors – across international and national, public and private divides – participate and collaborate in investigations of core international crimes. This decentralized and highly relational reality of contemporary investigations challenges established understandings of how fairness is to be safeguarded for suspects, victims and witnesses affected by the practices of investigative and prosecutorial actors. Safeguarding fairness in the collaborative turn is crucial because fairness is at the heart of the identity of international criminal law. It is argued that UN investigative mechanisms for Syria (IIIM), Myanmar (IIMM), Da'esh in Iraq (UNITAD) and other similar UN quasi-prosecutorial mandate-holders are well-placed to play a more active and coordinating role in safeguarding fairness in this collaborative turn, in particular *vis-à-vis* investigative civil society actors. Although lacking capacity to single-handedly foster fairness in investigative practices in conflict situations, UN investigative mechanisms and investigations have the capacity to anchor the collaborative turn in law and public authority, based on principles of impartiality, independence and fairness.

Keywords

International Criminal Law, UN investigative mechanisms, IIIM, IIMM, UNITAD, Collaborative turn, Fairness, Fair trial rights

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1. Introduction

Safeguarding fairness – in particular a fair trial for the accused – is closely related to the legitimacy, and even legality, of international criminal justice institutions.[1] The central requirement of a fair trial for the accused is reflected in the statutes of international and hybrid criminal courts and tribunals (hereinafter "international(-ized) criminal courts") since Nuremberg and Tokyo.[2] It would be particularly problematic if international criminal justice institutions did not respect fair trial rights, because violations of those rights may even amount to war crimes and crimes against humanity themselves[3], and are arguably violations of *jus cogens*.[4] The adherence by a criminal justice system to fairness also signals the elevation of an orderly law-bound response above the lawlessness of vengeance – a lawlessness of which the defendant often stand as a representative.[5] The importance of fairness for the self-

[1] ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Prosecutor v. Tadic* (IT-94-I), 2 October 1995, paras. 45-47. See also in relation to so called rebel courts in international humanitarian law, Mark Klamberg, "The Legality of Rebel Courts during Non-International Armed Conflicts", *Journal of International Criminal Justice,* vol. 16, issue 2 (2018): 235-63. Fairness is however not the *exclusive* justification for international criminal justice institutions. See on the need for an additional basis in how a court is constituted, Antony Duff, "Authority and Responsibility in International Criminal Law". In S. Besson & J.Tasioulas (Eds.), *Philosophy of International Law* (Oxford University Press 2010), pp. 589-604.

[2] Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press 2016), pp. 3-6.

[3] E.g. the war crime of wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial in Article 8(2)(a)(vi) ICC Statute and the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law in Article 7(1)(e) ICC Statute.

[4] Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021), p. 16.

[5] Gerry Simpson, *Law, War & Crime* (Polity Press 2007), p. 13.

understanding of international criminal justice can thus hardly be overstated. It has in this vein been described as a "core part of the identity of international criminal law".[6]

Different participants in the criminal law process of a justice system have different functions and roles in safeguarding fairness, and thus in upholding this identity. While it is typically for investigating and prosecuting authorities to *respect* and in some cases to *protect* fairness, counsel protects the interest of the client through the invocation of strict compliance with fairness requirements, while the court *ensures* fairness and has an overarching supervisory responsibility and authority.[7]

This way of understanding how fairness is to be safeguarded is useful for analyzing the responsibility and authority of different actors in one single justice system, but it comes under stress when confronted with the reality of contemporary collaborative investigations, characterized by a multitude of relations between actors across international and national, private and public divides. This may require us to focus more attention on the relations enabling justice to be done, rather than a limited focus on one single institution or jurisdiction.[8] Such a relational dimension of international criminal law invites us to re-think and, it is argued, even re-calibrate our established perceptions of by who, and in what way, fairness in contemporary international criminal investigations is to be safeguarded.

This paper is particularly concerned with how fairness risks and requirements in international criminal law relate to two newcomers to this collaborative turn in international criminal justice: UN investigative mechanisms and civil society organizations conducting investigative work for criminal accountability (hereinafter "CSO:s"). With UN investigative mechanisms as lead examples of the emerging international mandate to collect, preserve and analyze evidence of war crimes, crimes against humanity and genocide, and to assist accountability measures, the paper explores the potential role of such mechanisms and investigations in anchoring the collaborative turn in law and public authority, and their potential role in fostering fairness and coordinating investigatory practices of CSO:s.

2. The Collaborative Turn in International Criminal Justice

Achieving accountability for international crimes through fair trials has always been a collective endeavor, enabled by a delicate interplay between international(-ized) criminal courts on the one hand, and external cooperative actors on the other hand.[9] Cooperation is thus a

[6] Sophie Rigney, *Fairness and Rights in International Criminal Procedure* (Edinburgh University Press 2022), p. 61.

[7] Functions and roles of e.g. the judiciary also varies between justice systems with adversarial or more inquisitorial nuances. In the framework of the ICC, the prosecutor is under Article 54(1)(c) of the Rome Statute under an obligation in investigations to "[f]ully *respect* the rights of persons arising under [the ICC Statute]" (emphasis added). It is according to Article 64(2) of the Statute for the judiciary to *ensure* the right to a fair trial (emphasis added).

[8] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2018), p. 416.

[9] Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (Cambridge University Press 2018). Generally on cooperation in international criminal procedure, see Astrid Reisinger-Coracini, "Cooperation from States and Other Entities". In G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappalà (Eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013), p. 111.

precondition for overcoming the "evidence problem" of international criminal justice and have proved particularly important for the early securing of evidence.[10] Developments in contemporary conflicts as the ones in Syria, Iraq, Myanmar and Ukraine have however seen a dynamic in collaborative investigative responses on an entirely new level, going beyond established frameworks of cooperation and mutual legal assistance for individual accountability for core international crimes. The gathering, corroboration and verification of massive amounts of digital information through new technologies and the build-up of evidence repositories by a multiplicity of actors across international and national, public and private divides for use by jurisdictions external to these entities have become the hallmarks of this collaborative turn in international criminal justice.[11]

This collaborative turn is thus characterized by an expansion of participants employing tools and concepts of international criminal law.[12] This invites us to consider the functions, roles and relations within new constellations of participants in international criminal justice, and lessons that can be learned from collaborative challenges in international criminal justice in the past.

The collaborative trend is arguably the result of an increasing solidification of norms on international criminal accountability in international fora, although the invocation of international criminal law is still highly divisive, political and situation-specific.[13] The trend is evidenced by the "accountability turn" of UN human rights inquiry in recent years where the mandate to collect, preserve, analyze and assist has emerged.[14]

This solidification meant that – for those adhering to the progressive international criminal justice mission – it was inconceivable that there would be no international judicial reactions to situations of international crimes committed on a mass scale, or that justice had to wait for peace in protracted conflicts. The pressure for accountability measures was particularly intense in relation to the situation in Syria from 2011 and onwards. It was thus unthinkable that the vetoed Security Council resolution attempting to refer the situation to the ICC would have been the end of attempts for individual criminal accountability, which instead prompted discussions on alternative ways to achieve at least a measure of justice.[15] This is how the

[10] On the "evidence problem" of the ICC, see Christian M De Vos, "Investigating from Afar: The ICC's Evidence Problem", *Leiden Journal of International Law,* vol. 26, issue 4 (2013): 1009-1024.

[11] With regard to Syria, see Beth Van Schaack, "Innovations in ICL Documentation Methodologies and Institutions" in *Imagining justice for Syria: Water always finds its way* (Oxford University Press 2020).

[12] Alexa Koenig, "From 'Capture to Courtroom'", *Journal of International Criminal Justice* vol. 20, issue 4 (2022): 829–42, p. 841; Melinda Rankin, *De Facto International Prosecutors in a Global Era: With My Own Eyes* (Cambridge University Press 2022); Brianne McGonigle Leyh, "Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes", *International Journal of Transitional Justice* vol. 16, no 3 (2022): 363–79.

[13] Beth A Simmons and Hyeran Jo, "Measuring Norms and Normative Contestation: The Case of International Criminal Law", *Journal of Global Security Studies,* vol. 4, issue 1 (2019): 18-36.

[14] Federica D'Alessandra, "The Accountability Turn in Third Wave Human Rights Fact-Finding", *Utrecht Journal of International and European Law* vol, 33, issue 84 (2017): 59–76.

[15] See e.g. Permanent Mission of the Principality of Lichtenstein to the United Nations in New York and Lichtenstein Institute on Self-Determination at Princeton University, "Accountability in Syria, Meeting at Princeton University, 17 November 2014", https://www.regierung.li/files/medienarchiv/voelkerrecht/2014-11-17_Accountability_in_Syria_summary_final.pdf?t=635546855830096915 (accessed 31 October 2023).

innovative International, Impartial and Independent Mechanism for Syria (hereinafter "IIIM") was conceived through the UN General Assembly in 2016.[16] Inspiration was drawn from the "accountability turn" of UN human rights inquiry and in particular from the special mandate of the UN Commission of Inquiry for Syria to collect and preserve evidence and assist accountability measures for the El-Houlah massacre.[17] The IIIM was the blueprint employed by the UN Human Rights Council when it established the Independent Investigative Mechanism for Myanmar (hereinafter "IIMM") in 2018. The Security Council in turn had in 2017 created the Investigative Team for Da'esh in Iraq (hereinafter "UNITAD") with a similar mandate, after careful negotiations with and consent of Iraq.

The IIIM is mandated to "collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law".[18] The Terms of Reference of the IIIM makes it clear that the mandate concerns the crime of genocide, crimes against humanity and war crimes.[19] The IIMM and UNITAD have similarly formulated mandates.[20]

The dual mandate of these three UN investigative mechanisms to collect, preserve and analyze evidence and to assist fair trials in external jurisdictions is distinct but have similarities with an office of the prosecutor of an international(-ized) criminal court and with accountability-driven UN atrocity inquiry. Their mandate has in this vein been described as "quasi-prosecutorial"[21] and "pre-prosecutorial".[22] Similar mandates have increasingly been included

[16] Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice", *Journal of International Criminal Justice*, vol. 15, issue 2, (2017), 211–230.

[17] Independent International Commission of Inquiry on the Syrian Arab Republic to investigate the El-Houlah massacre, which took place in May 2012: Human Rights Council resolution A/HRC/RES/S-19/1, 1 June 2012, para. 8.

[18] International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, United Nations General Assembly Resolution 71/248, adopted 21 December 2016, UN Doc. A/RES/71/248 (hereinafter "IIIM-resolution"), para. 4.

[19] Report of the Secretary-General [Implementation of the resolution establishing the IIIM], 19 January 2017, UN Doc. A/71/755, Terms of Reference in Annex (hereinafter "IIIM Terms of Reference"), para. 4.

[20] Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, established through UN Security Council Resolution 2379 (2017), adopted 21 September 2017, UN Doc. S/RES/2379 (2017) (hereinafter "UNITAD-resolution"), para. 2; Independent Investigative Mechanism for Myanmar, established through United Nations Human Rights Council Resolution 39/2 "Situation of human rights of Rohingya Muslims and other minorities in Myanmar", adopted 27 September 2018, A/HRC/RES/39/2 (hereinafter "IIMM-resolution"), para. 22.

[21] IIIM Terms of Reference, para. 32.

[22] Federica D'Alessandra et al, *Anchoring Accountability for Mass Atrocities, The Permanent Support Needed to Fulfil UN Investigative Mandates*, Oxford Institute for Ethics, Law and Armed Conflict, May 2022, p. 8, https://www.elac.ox.ac.uk/wp-content/uploads/2022/10/Oxford-ELAC-Anchoring-Accountability-for-Mass-Atrocities.pdf, (accessed 31 October 2023).

in recent international investigative mandate-holders, including entities established for justice for international crimes committed in Ukraine within the UN, EU and the OSCE.[23]

The other key newcomer to international criminal justice is the investigative CSO, which has claimed a space as investigator, when barriers of jurisdiction, sovereignty, power politics and the lack of political will of states have prevented the ICC from intervention.[24] This is not to say that CSO:s are new to the realm of international criminal justice[25], but rather that we now see an unprecedented level of engagement of CSO:s with international criminal law, sometimes adapting the methodology of international prosecutors.[26] Not only have global and local human rights CSO:s and victim's associations focused more attention to evidence collection for accountability for international crimes, but this development has also seen the emergence of professional international criminal law CSO:s, such as the Commission for International Justice and Accountability (CIJA), applying international criminal law methodology to conduct investigations into international crimes in conflict situations such as Syria and Myanmar.[27]

This development is coupled with a move from tying the quest for justice to one specific institution and procedural regime (such as the ICC) to proactively searching for justice opportunities, characterized by the construction of investigations and case files collaboratively by multiple actors from "below".[28] Domestic enforcement of international criminal law has in this regard been instrumental in realizing some of the potential of the collaborative turn, although progress is geographically uneven.[29] One striking example is the trials of two former intelligence officials of the Syrian regime in the Koblenz Higher Regional Court, where German

[23] Independent International Commission of Inquiry on Ukraine, Human Rights Council Resolution 49/1 of 4 March 2022 and Resolution S-34/1 of 12 May 2022; Enhanced storage capacity of Eurojust pursuant to Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences ("Core International Crimes Evidence Database", CICED); Within the EU, an International Centre for the Prosecution of the Crime of Aggression in Ukraine has been established, within the confines of Eurojust; OSCE Moscow Mechanism of the human dimension invoked by Ukraine on 3 March 2022, report by professors Benedek, Bílková and Sassòli 12 April 2022. Koenig notes in relation to Ukraine that "[u]ltimately, any legal justice that is secured, no matter the jurisdiction, will reflect a trial by network", Koenig *supra* note 12, p. 841.

[24] The concept of a CSO does not represent a homogenous category of actors and there is a great variance of organizations within the concept. For the purposes of this paper, investigative CSO:s are understood as non-profit non-governmental organizations or associations that in fact conducts investigations into allegations of genocide, crimes against humanity and war crimes. Such organizations may be locally or internationally based and have varied interest and proficiency in international criminal law methodology.

[25] Nichols Haddad, *supra* note 9. For example, Article 15(2) of the Rome Statute refer to non-governmental organizations providing information to the prosecutor whereas Article 44(4) refer to the possibilities, in exceptional circumstances, of relying on assistance of non-governmental organizations as staff.

[26] Rankin *supra* note 12, p. 40.

[27] Rankin *supra* note 12, pp. 149-178.

[28] Antoine Buyse, Katharine Fortin, Brianne Mc Gonigle and Julie Fraser, "The Rule of Law from Below – A Concept Under Development", *Utrecht Law Review,* vol. 17, issue 2 (2021): 1–7.

[29] Florian Jeßberger and Leonie Steinl, "Strategic Litigation in International Criminal Justice", *Journal of International Criminal Justice* vol. 20, issue 2 (2022): 379–401.

prosecutors reached convictions for crimes against humanity for the defendants for widespread torture of detained prisoners.[30] The cases had been the result of a wide collaboration of multiple investigatory actors, including the IIIM, Eurojust, CIJA and German based European Center for Constitutional and Human Rights (ECCHR).[31]

3. Law, Principles and Authority of UN Investigative Mechanisms

This relational dimension of international criminal justice is at the heart of the mandate of UN investigative mechanisms, representing a public centralizing effort in the decentralized reality of largely unregulated CSO investigations. The mechanisms however lack statutory legal frameworks and compulsory prosecutorial authority and instead rely on voluntary collaboration. The central place of CSO:s in the collaborative mandate of the mechanisms is noteworthy as it is unprecedented in the history of international criminal justice institutions. In the resolution establishing the IIIM, the General Assembly called upon "all States, all parties to the conflict as well as civil society"[32] and requested the UN system as a whole[33] to fully cooperate with the Syria Mechanism. In a similar manner, the Human Rights Council when creating the Myanmar mechanism called upon "all States, including the Government of Myanmar and its independent commission of enquiry, and encourages civil society, business enterprises and other relevant stakeholders to cooperate fully with the mechanism" and requested the UN system as a whole to fully cooperate.[34]

A similar collaborative expectation is also manifested in the mandate of UNITAD. The Team is requested to cooperate "as appropriate, and consistent with its investigative functions" with the "Analytical Support and Sanctions Monitoring Team established pursuant to resolution 1526 (2004) and 2368 (2017) and with any other relevant monitoring bodies, and to work with other United Nations bodies within their respective mandates".[35] Collaboration with states is in the mandate of UNITAD carefully worded to balance the interests of Iraq being the "primary intended recipient" of evidence collected and the interests of other states.[36] However, all other states have been called upon in the mandate to cooperate with the Team.[37] The expectation of the Team cooperating with intergovernmental and regional organizations as well as with CSO:s "as appropriate and necessary for the implementation of its mandate" is expressed in the Terms of Reference.[38]

The design of the IIIM and IIMM contrasts to a significant extent with UNITAD because the former two were established in the face of fierce resistance by the territorial states concerned – Syria and Myanmar – whose governments were already subject to investigation by preceding

[30] Higher Regional Court of Koblenz, Judgment 24 February 2021, Case of Eyad A, case no. 1StE 3/21, 3BJs 9/19-4; and Higher Regional Court of Koblenz, Judgment 13 January 2022, Case of Anwar R. An official translation of the Eyad A. judgment is available at the website of the IIIM at https://iiim.un.org/documents/court-judgements/ (accessed 31 October 2023).
[31] Jeßberger and Steinl, *supra* note 29.
[32] IIIM-resolution, para. 6.
[33] *Ibid.,* paras. 7 and 27.
[34] IIMM-resolution, paras. 26-27.
[35] UNITAD-resolution, para. 12. See also UNITAD Terms of Reference, para. 36.
[36] UNITAD-resolution, para. 5.
[37] UNITAD-resolution, para. 10.
[38] UNITAD Terms of Reference, para. 38.

UN atrocity inquiries, while the UNITAD was created with the consent of the government of Iraq. Collaboration with different parts of the Iraqi state as the territorial state is therefore expected in the mandate of UNITAD while not included in the mandates of the Syria and Myanmar mechanisms. Crucially, the consent of Iraq and the mandate of UNITAD are restricted to the investigation of one category of perpetrators – those belonging to ISIL/Da'esh. This is in contrast to the Syria and Myanmar mechanisms which are unrestrained as to perpetrator categories.

The mechanisms are institutionally part of the UN and may be characterized as subsidiary organs with a particularly high degree of autonomy.[39] This entails the applicability of UN law and general international law applicable to the UN. While earlier and established international(-ized) criminal courts had recourse to statutory legal frameworks as their primary applicable source of law, the mechanisms rely on their founding resolutions and terms of reference, which do not provide detailed legal provisions. For further direction, they need to go beyond their founding resolutions and terms of reference to secondary branches of law and principles.[40] Secondary branches identified in these primary documents include international criminal law standards, international humanitarian law and human rights law, in particular fair trial rights and due process norms.[41]

Applying or transposing international criminal law and standards to the mechanisms however raises a number of questions and challenges. The first fundamental question relates to the applicability of international law as such to the mechanisms as UN subsidiary organs. The relation between international law and UN entities is not uncomplicated. It is however on a general level uncontroversial that the UN is bound by international law based on the "subject-thesis", according to which the UN is bound by international law "incumbent upon it" by virtue of possessing international legal personality.[42] Further support for bindingness is that UN entities are bound by international law by virtue of the adherence of the UN to international law, whether this adherence is manifested in the UN Charter and/or through the established practice and institutional law of the organization. A third theory for bindingness is the so-called "transfer-thesis" according to which states, being primary subjects of international legal obligation, have transferred authority and thus obligations to the UN, and that they cannot (and should not be permitted to) evade international law through creating an international organization that could legally do what they were not permitted to do themselves.[43]

It is asserted that the subject thesis clearly supports the claim that the mechanisms are bound by customary international law, including customary international criminal law and international human rights law. The identification of the exact content and scope of unwritten law however

[39] Rosalyn Higgins et al (Eds.), *Oppenheim's International Law, United Nations, Vol. I* (Oxford University Press 2017), pp. 188-189.

[40] The reference to secondary law here is not to be understood as such secondary rules that regulate international responsibility of states or international organizations.

[41] IIIM Terms of Reference, para. 17; UNITAD Terms of Reference, para. 19; IIMM Terms of Reference, para. 28.

[42] International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion, I. C.J. Reports 1980, at 89–90, para. 37.

[43] Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (T.M.C. Asser Press, 2016), p. 399.

poses a challenge and may be uncomfortable for international criminal justice institutions claiming legitimacy through the principle of legality.[44] The invocation by the founders of the mechanisms that they are to observe the law and standards of international law and in particular international criminal law, however indicates that they are bound by law and standards beyond customary international law. It appears to have been the intent of the founding UN organs that the mechanisms in this regard would apply the law and standards as reflected in the law as developed by international(-ized) criminal courts, including the ICC.

There is a special emphasis in the mandates that require the mechanisms to observe fairness. This is particularly clear in the assistance mandate where the mechanisms are limited to facilitating and expediting "fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that may in the future have jurisdiction".[45] The reference to international criminal law standards in the founding documents of the mechanisms in this regard signals that the mechanisms shall observe standards developed by international(-ized) criminal courts, including standards of fairness protection. Although international criminal law standards may not be entirely coherent between different jurisdictions[46], it is asserted that there is a certain core in those standards informed by internationally recognized human rights law.

The mechanisms are intended to function as impartial and independent investigative entities. The principles of independence and impartiality are closely related.[47] *Independence* signify integrity in the relations with others while impartiality is specifically concerned with an attitude or conduct "not prejudiced towards or against a particular side".[48]

Parameters of prosecutorial independence may be of relevance in order to adequately understand the requirements of independence of the mechanisms, although their *sui generis* character needs to be taken into account. Prosecutorial independence may be conceptually divided into individual, institutional and functional aspects.[49] The individual aspect pertains to a professional and objective attitude and conduct. Institutional independence in turn aims to protect the integrity of practices of the entity as an institution from other external actors, while functional independence means freedom of decision making within the confines of mandated functions. One important factor in relation to the functional aspect of prosecutorial independence is how resources are allocated and impact on the ability of a prosecutor to take

[44] Dov Jacobs, "International Criminal Law". In Jörg Kammerhofer and Jean D'Aspremont (Eds.), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014), 451-474.

[45] IIIM-resolution, para. 4. Slightly different formulation in the IIMM-resolution at para. 22 and UNITAD-resolution, paras. 2 and 4.

[46] Beti Hohler and Elizabeth Pederson, "The Syria Mechanism: Bridge to Prosecutions or Evidentiary Limbo?", 26 May 2017, p. 2, https://www.e-ir.info/2017/05/26/the-syria-mechanism-bridge-to-prosecutions-or-evidentiary-limbo/ (accessed 31 October 2023).

[47] Schabas contends that "[w]hile independence is desirable in and of itself, its importance really lies in the fact that it creates conditions for impartiality", W.A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge University Press 2006), p. 506.

[48] Collins English Dictionary, 'Impartial', http://www.collinsdictionary.com/dictionary/english/impartial (accessed 31 October 2023).

[49] Luc Côté, "Independence and Impartiality". In L. Reydams, J. Wouters and C. Ryngaert (Eds.), *International Prosecutors*, (Oxford University Press, Oxford 2012), 319–415,p. 322.

independent and impartial decisions. Although now funded through the regular UN budget, states have continued to provide extra-budgetary funding for specific purposes to the mechanisms. When these purposes involve the selection of investigations into certain group of victims, such as the grant of Hungary to UNITAD for pursuing investigations into crimes against Christians, the mechanisms arguably enter the borderlands of their functional independence.[50]

Impartiality is also recognized by the founders and by all three mechanisms themselves as an important principle for their activities.[51] In its first report, IIIM explained that the principle entailed that it would "apply consistent methods and criteria in its work that are not biased against, or in favour of, any particular State, group or individual" and furthermore that it would "take proactive steps to address crimes committed regardless of any affiliation of the alleged perpetrators" and "engage with potential providers of information and evidence relevant to crimes against victims on all sides".[52]

The principle of impartiality is closely related to the duty of objectivity.[53] While the IIIM and IIMM have been directed to include in their case files both exculpatory as well as inculpatory evidence, this is not the case for UNITAD.[54] The reference in the UNITAD mandate to the adoption of procedures of collection and preservation of evidence based on "the highest possible standards" may however suggest that the principle of impartiality encompass the duty to investigate both incriminating and exculpatory circumstances.[55] This may be a practical challenge for the Team as ISIL members are regarded as *hostis humanis*.

The emergence of the mechanisms responds to the need for a measure of central *coordination* by a public institution of highly decentralized evidence gathering, often undertaken by diverse private initiatives. Their mandates provide them with the potential to play a centralizing and coordinative role. Although this coordinating role may be more limited *vis-à-vis* established public authorities, they may play such a role in coordinating CSO investigations and to connect diverse actors and initiatives. The mechanisms however need to be careful in their interactions with investigative CSO:s so as to always maintain their independence and impartiality and guard against actions that could render their mother UN organization responsible for actions by CSO:s. The Syria Mechanism has been the most articulate in taking on a possible coordinating role between national and international actors, with civil society, and both in

[50] Seventh report of UNITAD to the Security Council, 2 December 2021, UN Doc. S/2021/974, para. 129.

[51] First report of the IIIM, 28 February 2018, UN Doc. A/72/764, para. 15; First report of the IIMM, 7 August 2019, UN Doc. A/HRC/42/66, para. 12 in relation to case-selection, para. 17 in relation to seeking the truth impartially including collection of exculpatory evidence, para. 21 in relation to precautions for the full preservation of independence and impartiality in the engagement with external actors; First report of UNITAD, 16 November 2018, UN Doc. S/2018/1031, paras. 20-21.

[52] First report of the IIIM, *ibid*, para. 15.

[53] Article 54(1)(a) ICC Statute.

[54] IIIM Terms of Reference, para. 12; First report of the IIIM, *supra* note 51, paras. 15 and 50; IIMM Terms of Reference, para. 16; First report of the IIMM, paras. 17 and 57.

[55] UNITAD Terms of Reference, para. 19. This would certainly be the case if such highest possible standards are interpreted as equivalent to the standards of the ICC, including Article 54(1)(a) of the ICC Statute.

collection and end-user jurisdictions.[56] The possible coordinating role of the mechanisms depend however not only on their own mandates, applicable law, willingness and ability but also on the position and attitude of their collaborating partners. This is why they need to build and maintain relations of trust with key partners.[57]

What modalities of collaboration are available to the mechanisms? In addition to any inherent or implied authority to act externally, the mechanisms have in their terms of reference by the Secretary-General been expressly authorized to conclude agreements with any state or entity.[58] This reference to the generic term "entity" provides the mechanism with authority to enter agreements with also such bodies that are not international legal persons.[59] While the mechanisms have treaty-making authority, a treaty is not an option for a formalized relation with a non-governmental CSO. Instead, the mechanisms have entered into a number of MoU:s and arrangements with CSO:s. In the case of the IIIM, a number of CSO:s and the mechanisms have signed a "protocol of cooperation" outlining principles for their interaction.[60] Such formalized public agreements with a group of CSO:s are not found at UNITAD or the Myanmar mechanism. As at the IIIM there are however frequent interactions and meetings with CSO:s allowing for a more personal exchange.[61]

The mechanisms are not just any partner in collaborative endeavors for justice. In contrast to CSO:s, they are vested with an international public authority bound by law.[62] The mechanisms are creations of the UN, a public international organization of member states. The aim is to support individual criminal accountability of individuals, thus through the application of power and authority, be it in a national or international court. They have investigative and quasi-prosecutorial functions and are required to apply tools, concepts and principles from international criminal law and standards. While they do not themselves possess compulsory investigatory, prosecutorial or judicial authority, they are mandated to contribute to and anticipate the exercise of such authority. Because their mandate is completely dominated by their interactions with others, their authority can thus be described as a relational one, which is exercised in the *anticipation* of hard prosecutorial and judicial authority.[63]

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[56] IIIM First report, *supra* note 51, paras. 12, 21, 64 and 72.

[57] See e.g. Craggs et al. on the challenges in collaborating with international humanitarian actors for international criminal justice, S. Craggs et al., "Finding a Middle Ground? International Humanitarian Aid Organizations, Information Sharing, and the Pursuit of International Justice", *Human Rights Quarterly* vol. 44, issue 3 (2022): 564–91.

[58] IIIM Terms of Reference, para. 37; UNITAD Terms of Reference, para. 32; The Terms of Reference of IIMM include any organization in addition to any state or entity, IIMM Terms of Reference, para. 36.

[59] See e.g. UN Treaty Handbook, (UN Publication, Revised edition of 2013), section 5.3.3 "Parties".

[60] The protocol is available at https://iiim.un.org/wp-content/uploads/2021/05/Protocol_IIIM_-_Syrian_NGOs_English.pdf (accessed 31 October 2023).

[61] See annual reports of the mechanisms and bulletins of information available on their websites: https://iiim.un.org/; https://www.unitad.un.org/; https://iimm.un.org/ (all accessed 31 October 2023).

[62] Armin von Bogdandy, Philipp Dann & Matthias Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities". In Armin von Bogdandy (Ed.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010), p. 8.

[63] Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013).

4. Fairness Challenges in the Collaborative Turn

Certain fairness challenges that are well-known to international criminal justice are particularly accentuated in the collaborative turn. The under-regulation of the investigatory phase in international criminal procedure and the largely unregulated character of private investigators collaborating with international criminal law institutions are one such challenge. The impact on the protection of fairness by the expansion of participants that collaborate and employ methodologies that have hitherto been reserved exclusively for public authorities in states or international tribunals is still a somewhat open question. The absence of enacted statutory legal frameworks of the mechanisms also means that we are to some extent left without clear answers as to how the mechanisms operate and pursuant to what standard. The lack of judiciary and defense functions in UN investigative mechanisms furthermore entail that investigations are being made without access to judicial control and without counsel to protect the rights and represent the interests of persons affected.

UN investigative mechanisms to some extent rely on intermediary sources in their investigations. The first cases of the ICC – the Lubanga and Katanga cases – showed how an over-reliance on such third-party investigators and intermediaries might jeopardize the integrity of the justice process and the real or perceived impartiality of and control by the prosecutor responsible for investigations.[64] Investigative CSO:s are usually not bound by the statutory frameworks of international(-ized) criminal courts and may have gathered evidence in ways challenging fair trial rights of an accused.[65] Special concerns appear when accepting evidence gathered illegally by such third parties.[66] The lack of supervision over intermediaries who acted improperly in the Democratic Republic of the Congo nearly collapsed the Lubanga and Katanga cases. To make matters worse, relations between the UN and the prosecutor strained in the Lubanga case when the prosecutor was ordered to disclose sensitive information it had "recklessly accepted" through excessive use of confidentiality agreements with the UN.[67] There are also examples from domestic prosecutions of fairness challenges caused by collaboration. For example, the investigative effort of Human Rights Watch in Kosovo, which included showing photographs of possible suspects for victims and witnesses, impacted negatively on the reliance and probative value of subsequent testimony at one of the first international

[64] ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo*, Pre Trial Chamber I, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 35; Caroline Buisman, "Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment" *Northwestern Journal of International Human Rights,* vol. 11 issue 3 (2013): 30.

[65] On instances when private investigators may come within the ambit of the ICC Statute, see Rafael Braga Da Silva, "Sherlock at the ICC? Regulating Third-Party Investigations of International Crimes in the Rome Statute Legal Framework?", *Journal of International Criminal Justice*, vol. 18, issue 1 (2020): 59-86.

[66] Alexander Heinze, "Evidence Illegally Obtained by Private Investigators and Its Use Before International Criminal Tribunals", *New Criminal Law Review,* vol. 24 no. 2 (2021): 212-253.

[67] ICC, *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Pre-Trial Chamber I (Judge Sylvia Steiner), ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, para. 46; Larry D. Johnson, "The Lubanga Case and Cooperation between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation", *Journal of International Criminal Justice* vol. 10, no. 4 (2012): 887–903.

criminal law cases in Sweden.[68] Similar fears have been voiced of multi-actor over-documentation of Rohingya victims in Bangladesh, which may have adverse consequences for reliability and probative value.[69]

The sheer amount of information comes with its own fairness risks, including the risk of selection bias in multi-actor documentation, especially open source-investigations.[70] Although the impressive amount of atrocity information has the potential to assist verification and corroboration, numbers alone doesn't necessarily entail an objective and impartial reflection of actual crimes committed in a conflict. The issue may be exacerbated by the tendency of donors and CSO:s to crowd to particular conflicts and issues.

The handling of vast amounts of sensitive investigative information carries particular security risks warranting effective protection of sources, victims, witnessers and possible suspects, risks that may be particularly challenging for unregulated or under-regulated actors. The recent negotiations in Ljubljana on a convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other crimes (MLA Convention) demonstrated how law on data protection has entered the territory of international criminal law.[71] Considering that the information preserved by mechanisms and CSO repositories amounts to terabytes of data of personal information, the possible impact of the right to privacy and data regulations, especially from the EU GDPR, may challenge how the mechanisms operate and collaborate with European partners.

Specific fairness challenges also include how to protect defense rights, in particular the principle of equality of arms and the right of disclosure of potentially exculpatory information. Questions need to be asked what it means for the rights of an accused to be confronted with repositories where multiple evidence providers have continued control over their submitted evidence through confidentiality agreements.

5. Fairness Requirements in the Collaborative Turn

Despite the difficulties in discerning precise applicable law and standards of the mechanisms, it is here contended that UN investigative mechanisms and investigations are bound by a universally applicable core of fairness requirements in international criminal procedure, informed by human rights obligations. Anni Pues has made a useful distinction of fairness in international criminal law, based on reasoning of Chambers of the ICC: A general component applicable to various legal proceedings, and a specific one – the right to a fair trial – protecting

[68] Case of *Martinovic*, Svea Court of Appeal, Sweden, Judgment 19 December 2012, Case no. B 1248-12, pp. 8-11.

[69] Eva Buzo, "Capturing a Crisis: What Lessons Can We Learn from the 'Overdocumentation' of the Rohingya Crisis?", *Justice in Conflict*, 20 May 2020, https://justiceinconflict.org/2020/05/20/capturing-a-crisis-what-lessons-can-we-learn-from-the-overdocumentation-of-the-rohingya-crisis/ (accessed 31 October 2023).

[70] Yvonne McDermott, Alexa Koenig and Daragh Murray, "Open Source Information's Blind Spot", *Journal of International Criminal Justice,* vol. 19, issue 1 (2021): 85-105.

[71] Bruno de Oliveira Biazatti and Ezéchiel Amani, "The Ljubljana – The Hague Convention on Mutual Legal Assistance: Was the Gap Closed?" EJIL: Talk! 12 June 2023, https://www.ejiltalk.org/the-ljubljana-the-hague-convention-on-mutual-legal-assistance-was-the-gap-closed/ (accessed 31 October 2023).

rights of defendants in criminal proceedings.[72] While the right to a fair trial of defendants is fairly well determined in international criminal law[73], there is continuous debate about the requirements and personal protective scope of general fairness in international criminal proceedings.[74]

5.1. The right to a fair trial

The right to a fair trial is a central component of international criminal justice, aptly demonstrated by its inclusion in the statutes of international(-ized) criminal courts. Article 67 ICC Statute, Article 21 ICTY and Article 20 ICTR Statute ensure this right to the accused in criminal proceedings, modelled on relevant parts of Article 14 ICCPR.

The impact of human rights law on international criminal procedure is demonstrated by the extensive references of international criminal justice institutions to universal and regional conventions and practices, not least the European Convention on Human Rights and the abundant case law of the European Court of Human Rights.[75] This role of human rights law was particularly emphasized with the adoption of the Rome Statute of the ICC. Fair trial rights as minimum guarantees for the accused in Article 67 are in the Statute complemented by Article 64(2) (Trial Chambers' duty to ensure fair proceedings with full respect for the rights of the accused), Article 20 (*Ne bis in idem*), Article 22 (*Nullum crimen sine lege*), Article 23 (*Nulla poena sine lege*), Article 66 (Presumption of innocence), Article 69 (Evidence) as well as several articles protecting fairness in state cooperation (Article 59 and Part 9) and concerning right of appeal (Articles 81 and 82) and compensation (Article 85). Notably, Article 21(3) imposes the additional safeguard that the application and interpretation of applicable law "must be consistent with internationally recognized human rights" without discriminatory distinction.

The investigatory phases preceding trial tend to be more loosely regulated in international criminal law than trial and immediate pre-trial phases, entailing challenges in the identification of standards of fairness.[76] Certain parameters of fairness in investigations may however be discerned through the (perhaps counterintuitive) extension of fair trial rights into this phase, and general fairness requirements drawn from the application and interpretation of international criminal law and human rights law by international(-ized) criminal courts, human rights courts and UN human rights inquiry.

This applicability of fair trial rights to the investigatory stage has been recognized both by Chambers at the ICC and the European Court of Human Rights, somewhat at odds with an understanding emphasizing the separation of the investigatory phase, dominated by crime

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[72] Anni Pues, "A Victim's Right to a Fair Trial at the International Criminal Court?: Reflections on Article 68(3)", *Journal of International Criminal Justice,* vol. 13, issue 5 (2015): 951-72; ICC, Decision on Prosecutor's Applications for Leave to Appeal dated the 15th Day of March 2006 and to suspend or stay Consideration of Leave to Appeal dated the 11th day of May 2006, Situation in Uganda (ICC-02/04-01/05-90-US-Exp), Pre-Trial Chamber II, 11 July 2006, para. 24.

[73] Clooney and Webb, *supra* note 4.

[74] McDermott, *supra* note 2, pp. 125-147; Rigney, *supra* note 6, p. 167.

[75] See e.g. ICTY, *Barayagwiza v. Prosecutor*, Decision, Case No. ICTR-97-19-A, Appeals Chamber, 3 November 1999, para. 40.

[76] Karol de Meester, *The Investigation Phase in International Criminal Procedure: In Search of Common Rules* (Intersentia, Cambridge, 2014), p. 7.

control rationales, with the trial phase, where such rationales are counterbalanced by fairness concerns.[77] The European Court of Human Rights has thus recognized an autonomous definition of "any criminal charge", which triggers the right to a fair trial, to mean that the right is alternatively triggered "from the point at which his [the applicant] situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him".[78]

The Grand Chamber of the European Court of Human Rights in the case of *Ibrahim and others v. the United Kingdom* emphasized the particular importance the investigatory stage may have for preparation of criminal proceedings and the vulnerability of the accused at this stage. It explained that:

> *"[…] evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial and national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings".*[79]

In the Situation of the Democratic Republic of the Congo, ICC Pre-Trial Chamber I even recognized that the principle of a fair trial applied to the investigation phase of an ICC *situation*, which means even prior to the charging, arrest or summons of a defendant. With a reference to case law of the ICJ, the Chamber emphasized the principle of equality as a key aspect of fairness and that fairness of the proceedings included respect for procedural rights of the prosecutor, defense and victims, "as guaranteed by the relevant statutes".[80]

The right to a fair trial is thus not relevant just for the trial itself, but also for how the trial has been prepared. This means that fair trial rights carry an anticipatory potential already at the investigative phase and that the fairness of a trial may become "seriously prejudiced" even through an initial failure to observe requirements of fairness before a case is sent to trial.[81] The clearest example of this may be the prohibition under Article 15 of the UN Convention against Torture of accepting evidence collected through torture or other inhuman or degrading treatment.[82]

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[77] Alexander Heinze, "Private International Criminal Investigations and Integrity". In M. Bergsmo and V. Dittrich (Eds.), *Integrity in International Justice*, Nuremberg Academy Series, No. 4 (2020) (Torkel Opsahl Academic EPublisher, 2020), p. 707.

[78] European Court of Human Rights, Grand Chamber, *Case of Ibrahim and others v. the United Kingdom* (App no. 50541/08, 50571/08, 50573/08, 40351/08), Judgment 13 September 2016, para. 249.

[79] European Court of Human Rights, Grand Chamber, *Case of Ibrahim and others v. the United Kingdom, ibid.*, para. 253.

[80] ICC, Situation in the Democratic Republic of The Congo, Pre Trial Chamber I, Decision on the Prosecution's Application For Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 31 March 2006, para. 38.

[81] European Court of Human Rights, *Imbrioscia v. Switzerland*, Application No. 13972/88, Series A, No. 275, Judgment 24 November 1993, para. 38.

[82] The ICC Prosecutor in Lubanga asserted that "evidence obtained under torture […] would be inadmissible before this Court under Article 69(7)", ICC, *Prosecutor v. Lubanga*, Prosecutions Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006, ICC-01/04-01/06, 17 November 2006, para. 34.

5.2. Fairness as a general principle in international criminal investigations

Fairness as a general principle is less well-determined than fair trial rights and is not comprehensively described in international criminal procedure. It however implies that there are limits to the legal space for investigatory and prosecutorial choices and limits to investigatory methods. Prosecutorial discretion is thus not unlimited but restrained by fairness related principles such as impartiality, independence, and objectivity.[83] The restriction in the mandate of UNITAD to one category of perpetrators – ISIL/Da'esh members – is from this perspective problematic, as it pre-defines choices of a prosecutor.

The expansion of fairness protections into the investigation stage is also expressed in Article 55 of the ICC Statute, which has been described as breaking new ground as the first provision in a statute of an international(-ized) criminal court to address the protection of other persons in the investigative phase, in addition to suspects.[84] The first paragraph of the Article provides rights of any person affected by an investigation (right not to be compelled to confess guilt, the prohibition on coercion, duress, threat, torture or other cruel, inhuman or degrading treatment as well as right to be questioned in his or her language, and the right to liberty). The second paragraph provides rights to suspects, in particular to be informed of a suspicion ("that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court"), to remain silent, to legal assistance, and to be questioned in the presence of counsel. There is however limited case law clarifying the content and scope of the Article. Defendants have so far not succeeded in convincing ICC judges that the article applies to the questioning by national authorities prior to transfer of the suspect to the court, if that questioning is not made pursuant to a request by the ICC.[85]

Article 55 nonetheless demonstrates the impact of human rights law on international criminal law, extended into the investigative phase. This impact appears to have increasingly challenged the view that insulates investigations from the protective reach of fair trial and fairness requirements, dominating trial phases. This has been described as the evolution of a protective "*de facto* continuum from investigation to trial".[86]

These fairness protections are reinforced by the standards developed in UN atrocity inquiry and an increasing body of guidelines, codes and standards for CSO:s. A number of principles and practices have developed in relation to accountability-driven inquiry.[87] These include principles relevant to fairness considerations such as to do no harm, independence, impartiality, objectivity, integrity and consistency.[88] Similar principles have been expressed in

[83] Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart 2022).
[84] Dov Jacobs, "Article 55", in Kai Ambos (Ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth edition, Beck Hart Nomos 2022), p. 1661.
[85] ICC, *The Prosecutor v. Dominic Ongwen*, Trial Judgment, 4 February 2021, ICC-02/04-01/15, paras. 46-55.
[86] de Meester, *supra* note 76, p. 69.
[87] See in particular *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Commissions of Inquiry and Fact-Finding Missions on International Human Right and Humanitarian Law: Guidance and Practice*, UN Doc. HR/PUB/14/7 (2015); OHCHR Who's responsible?, Guidance 2018, HR/PUB/18/3.
[88] *OHCHR Guidance and Practice*, *ibid.,* pp. 33-35.

relation to CSO:s undertaking investigative work for accountability purposes. One of the more recent additions is the ICC Office of the Prosecutor and Eurojust Genocide Network *Guidelines for civil society organisations in documenting international crimes*. In these guidelines, a number of general principles are described pertaining to "do no harm", informed consent, objectivity, impartiality and independence, accountability and legality, and professionalism and respect.[89] More detailed *Basic Investigative Standards* have recently been produced by Global Rights Compliance in an attempt to guide civil society in Ukraine documenting international crimes, outlining six "essential documentation rules" as well as "survivor-centred principles for dealing with victims and witnesses". In the Open Source Investigative domain, the *Berkeley Protocol on Digital Open Source Investigations* should also be mentioned.[90]

6. A shared responsibility for fairness protection?

In its first report to the General Assembly, the IIIM underscored that it "sees accountability as a responsibility extending across multiple jurisdictions and involving coordination between national and international actors".[91] This also means that the responsibility to safeguard fairness in a similar manner could be regarded as a shared responsibility. It is here argued that this responsibility is relative in the sense that the mechanisms in some instances will have access to international or national investigative or prosecuting authorities responsible for respecting and protecting fairness, and sometimes with access to a judiciary responsible for ensuring fairness.

On the international level, the mechanisms anticipate ICC jurisdiction or a similar standard. In the case of Myanmar, the ICC has indeed found partial jurisdiction, including for investigating the crimes against humanity of forcible deportation of the Rohingya population to the State party Bangladesh.[92] The Myanmar mechanism assists the Office of the Prosecutor of the ICC in this investigation and its investigatory activities would therefore potentially be subject to scrutiny by the ICC.[93] When assisting domestic prosecutions, it is national judiciaries which will evaluate the evidence shared and may be requested to evaluate investigatory standards employed.[94]

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[89] ICC-OTP – Eurojust, Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations, 2022, available at https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOs_Guidelines_2-EN.pdf (accessed 31 October 2023).

[90] Berkeley Protocol on Digital Open Source Investigations, 3 January 2022, Published jointly by OHCHR with the Human Rights Center at the University of California, Berkeley, School of Law, available at https://www.ohchr.org/en/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source (accessed 31 October 2023).

[91] First report of the IIIM, *supra* note 51, para. 12.

[92] ICC, *Situation in The People's Republic of Bangladesh/Republic of The Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, 14 November 2019, ICC-01/19.

[93] Eleni Micha, "Evaluating the Evidence by the UN International Investigative Mechanisms: a New Challenge for the International Criminal Court?", *International Criminal Law Review*, 4 August 2022: 1–27.

[94] Natalia Krapiva, "The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence be Admissible in European Courts?", *California Law Review,* vol. 107 (2019): 1101-1118. If needed, the mechanisms may however ultimately claim immunity as UN entities shielding them from intrusive scrutiny.

However, in relation to the vast majority of their activities hitherto, access to judiciary and prosecutorial functions are lacking. This may invite the mechanisms to consider a stronger role in safeguarding fairness, as the only centralizing function in the decentralized reality of largely unregulated CSO investigations. In this sense it is submitted that the mechanisms have a shared responsibility with other collaborative actors as one part of an accountability puzzle with pieces found in different jurisdictions.[95] The role of the mechanisms as international public authorities, in contrast to CSO:s, in this regard has the potential to anchor the collaborative turn in public law and authority.

Non-governmental CSO:s are not as such subjects of international legal obligation, but may come within the ambit of procedural regimes of those jurisdictions they are collaborating with. If they can be said to act on behalf of a public institution, CSO actions may become attributable to that institution.[96] This may in some instances mean that they become bound by the procedural framework applicable to the public institution. This may be the case at the ICC also for third-party investigators working for state authorities or international organizations acting upon request by the ICC.[97]

When acting independently, without any request or expectation of a public authority of collaboration from the CSO, it is however difficult to claim that its actions are within the realm of international law. Alexander Heinze has attempted to overcome this difficulty through a recourse to a Luhmannesque theoretical approach to international criminal procedure. In his account, international criminal procedure should be understood as a system without specific addressees and thus having the capacity to include everyone participating in the system and who *de facto* conducts an investigation.[98] CSO investigators could in this understanding be considered bound by fairness protections in international criminal procedure, not on the basis of their legal personality but rather through their participation in the system.

Melinda Rankin approaches the problem from another point of view. She argues that “de facto international prosecutors implicitly conceptualise the evolving nature of the international criminal law system as a type of common law govern by an unwritten international constitution for crimes accepted and recognised as *jus cogens* of international law”[99] In her view, “de facto prosecutors” adopt on an interim, provisional or probational basis the practices of de jure prosecutors and apply this common law for crimes, with the intention of having their actions validated by state legal officials.[100]

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[95] On the concept of shared responsibility between states and non-state actors in international law, see Jean d’Aspremont et al, "Sharing Responsibility Between Non-State Actors and States in International Law: Introduction" *Netherlands International Law Review,* vol. 62 issue 1 (2015): 49-67.

[96] In relation to international organizations such as the UN investigative mechanisms, being part of the UN organization, see draft article 4(a), International Law Commission, Draft articles on the responsibility of international organizations, 2011, UN Doc. A/66/10. It is noteworthy that the ICC OTP-Eurojust guidelines contain several references that appear to aim to avoid conceiving CSO investigations as attributable to the ICC and national authorities.

[97] Braga Da Silva, *supra* note 65, p. 64.

[98] Heinze, *supra* note 66, pp. 677-679.

[99] Rankin, *supra* note 12, p. 214.

[100] *Ibid.,* p. 204.

This emerging discussion on the possible legal obligations of investigative CSO:s could further benefit from insights in research and policy on shared responsibility in international law[101] and on human rights obligations of non-state actors.[102] Inspiration could in this regard be drawn from the analysis of the concept of human rights obligations in the *UN Guiding Principles on Business and Human Rights*, where distinctions are made into duties to respect, protect and fulfill human rights obligations.[103]

Applying this approach to the relationship between UN investigative mechanisms and CSO:s would require a contextual assessment of the role of a particular CSO. The extent to which they actually function as a placeholder for investigations by public authorities and their relations with such authorities would be important parameters in this assessment. The emergence of professionalized international investigative CSO:s as CIJA creates an expectation by their founders and donors of adherence to international criminal law methodologies, including respecting fundamental requirements of fairness. When such organizations are in fact operating as implicitly outsourced investigations for a joint group of states, it is reasonable to expect compliance and respect for fundamental investigative principles such as those reflected in the ICC OTP-Eurojust guidelines.[104]

7. Conclusions

The emergence of UN investigative mechanisms and similar mandates in international relations bring the relational dimension of international criminal law to the fore. It invites us to re-think and, it is argued, even re-calibrate our established perceptions of by who, and in what way, fairness in contemporary international criminal investigations is to be safeguarded.[105] This is particularly so when established national or international criminal justice authorities lack jurisdiction or are otherwise inactive. Although consensus is lacking on the exact contours of the concept of fairness in international criminal law, it is contended that it is so closely connected to the very identity of international criminal justice as to enable it to function as a shared expectation by an expanding scope of participants in international criminal law. The alternative of not observing high standards of fairness would risk unsettling this identity and legitimacy of international criminal justice as a law-bound response to conflict situations.

Looking at fairness protection as a shared responsibility may provide a starting point for discerning the emerging functions and roles of key actors in the collaborative turn. A key relation in this turn is the one between UN investigative mechanisms and investigative CSO:s. This paper has addressed four main reasons why UN investigative mechanisms are well placed to foster fairness and coordination in this relation: 1. Their *relational and collaborative mandate* and authority; 2. Their unique dual mandate as *public international authorities bound by law*, in an otherwise decentralized investigative environment; 3. That their applicable law

[101] d'Aspremont et al, *supra* note 95.
[102] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).
[103] UN Guiding Principles on Business and Human Rights, 2011, UN Doc. HR/PUB/11/04, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 31 October 2023).
[104] Elena Baylis, "Outsourcing Investigations", *UCLA Journal of International Law and Foreign Affairs,* vol. 14, issue 1 (2009): 121–47.
[105] McGonigle Leyh, *supra* note 12, p. 378.

and authority are solidly *grounded in fairness, impartiality and independence*; and 4. The actual practices of the mechanisms in building and maintaining formal and informal *interactions with investigative CSO:s*.

However, just as everything else in the collaborative turn in international criminal justice, the mechanisms cannot foster fairness in CSO investigative practices single-handedly. Similarly to ICC activities furthering "positive complementarity" in ICC States parties, they need to liaise with capacity-building actors to develop professionalism and integrity of investigative CSO:s so as to raise the standards and capacities in the securing of evidence before it is too late, in a way that enable fair, impartial and independent justice to eventually be done.