International Human Rights Fact-finding Praxis in its Living Forms: A TWAIL Perspective

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INTERNATIONAL HUMAN RIGHTS
FACT-FINDING PRAXIS IN ITS LIVING FORMS: A TWAIL PERSPECTIVE

By

Obiora C. Okafor*

Introduction

International human rights fact-finding (hereinafter “IHRFF”) has been defined, rather generously, as:

A method of ascertaining facts through the evaluation and compilation of various information sources...[which] serves to illuminate the circumstances, causes, consequences and aftermath of an event from a systematic collection of facts.1

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Understood in this way, IHRFF is not a new activity. Rather, various organizations, groups, and entities have engaged in it for a very long time. Indeed, issues relating to its ways and means, conceptual and operational problems, and best practices have occupied the attention of many practitioners, and cringed the brows of many of scholars, for a fairly long time. However, recent years have witnessed an increased deployment of IHRFF in response to alleged violations of human rights in a range of climes. This may be a possible justification for the renewed attention that it appears to receiving among academics and practitioners alike. In particular, given the increasing salience of IHRFF and the tremendous power that its practitioners can increasingly exert in both domestic and world affairs, contemporary scholarly commentators appear to be justified in renewing their quest to

4. Boutrouche, supra note 1 at 3.
understand IHRFF and, if necessary, stimulate its thoughtful reform. This article is a modest attempt to contribute to the emergent process of the renewed study of that praxis.

As a first step, however, it is necessary to distinguish between the various kinds of IHRFF. As Frans Viljoen has observed, one must distinguish between the types of IHRFF conducted by a range of actors. Viljoen is correct, for as may be clear to discerning observers of the international scene, IHRFF can be conducted by a UN organ (such as the UN Human Rights Council), an international NGO (such as Amnesty International or Human Rights Watch), a local NGO (such as the American Civil Liberties Union or the Civil Liberties Organization of Nigeria), and an individual state (such as the USA or China). M. Cherif Bassiouni has even made important distinctions among the various sub-types and manifestations of specifically UN-driven IHRFF missions (based on the identity of the organ that established them, the degree of support they enjoy from the Western countries which hold a veto in the UN Security Council, and so on). It is also possible to adopt the alternative (but not necessarily opposing) taxonomy suggested by Viljoen which differentiates among three kinds of IHRFF, namely: investigative IHRFF, indirect IHRFF via examining state reports, and complaints-based IHRFF. While all of these taxonomical distinctions must be kept in mind as one analyzes IHRFF (principally because the various manifestations and types of this IHRFF are not always


7. Viljoen, supra note 5.
identical in form and substance, and the pitfalls of one kind or sub-kind of IHRFF may have been overcome by another form or sub-form of that praxis), it should be noted here that the focus of the analysis in this article is on investigative IHRFF as conducted by the UN, international NGOs, local NGOs, or one country (as opposed to either indirect or complaint-based IHRFF).

With this in mind, the main goal of the article is to systematically interrogate and assess IHRFF as a form of praxis, and to do so from a critical third world approach to international law (TWAIL) perspective. To what extent (if at all) does IHRFF suffer from certain of the problematic features of general international law praxis that have been identified and analysed by TWAIL scholars (as well as some other critical socio-legal thinkers)? More specifically, to what extent (if at all) does IHRFF suffer from a witting or unwitting (and almost always problematic) adherence to the heaven/hell binary, the one-way traffic paradigm, the orientation of the Western gaze, colonialist styles and approaches, and other similarly problematic methodological approaches? To what extent (if at all) does IHRFF suffer from a conscious or unconscious facilitation of or implication in the unqualified and univalent stigmatization of third world cultures, and from a tendency to engage in a conceptual “economy of appearances”? To what degree (if at all) has IHRFF been susceptible to capture by certain formations or matrixes of global power? What, if any, are the implications for IHRFF of it being afflicted by any of these identified problems? And in the circumstances, what would a reasonably acceptable form of IHRFF look like? In this last connection, the point is that even if IHRFF does not currently suffer in significant measure from any of the afflictions mentioned here, there may be significant
value in reminding those who engage in it of the need to become or remain as alert as they possibly can to these potential pitfalls.

Since the analytical interrogation and assessment of IHRFF that is undertaken in this article is largely framed, shaped and animated by a TWAIL perspective, it is important that the nature of that approach is outlined at the outset, albeit rather briefly. As I have noted elsewhere, TWAIL is an umbrella signifier for a broad range of scholars who participate in what Makau Mutua has described as a dialectic of opposition to the generally unequal, unfair and unjust character of an international legal regime that all too often (but not always) helps subject the Third World to domination, subordination and serious disadvantage. Beyond this pithy explanation, space constraints do not allow much more to be said here regarding the nature of TWAIL as a scholarly movement. In any case, since the nature of the TWAIL movement has been exhaustively adumbrated and explained in the literature, a detailed treatment of that definitional question should not detain us. Suffice it to emphasize that, as internally diverse as their approaches and conclusions can often be:

TWAIL scholars (or “TWAILers”) are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust

global order...a commitment to centre the rest rather then merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case. 9

Methodologically, the analysis in article is developed via a step-by-step consideration of the available “primary” 10 and secondary evidence, in light of insights that are already available in the academic TWAIL literature regarding the problematic features of general international law praxis (some of which have been identified above). This evidence consists chiefly of the contents of actual IHRFF Reports (as produced by UN agencies or NGOs), other pertinent documents produced by some of these actors (such as the “Facts and Figures” document produced by the Office of the UN High Commissioner for Human Rights), and material that is already available in academic writings on IHRFF.

Another important methodological point is that - to the extent that this is even possible - it is imperative that scholars, such as myself, who largely support the human rights movement, maintain a large enough measure of methodological detachment when they analyze that movement or any aspect of it. 11 There is a great need for those of us who

10. The phrase “primary evidence” refers to the reports and other documents produced and/or published by the UN, governments, or NGOs which we reviewed as part of our research.
11. For an excellent discussion of “porosity of the border between activism and research,” and an analysis of “the slippage between the role of the activist and scholar and the impossibility of separating them,” see S.E. Merry, “Anthropology and Activism: Researching Human Rights across Porous
tend to agree with Upendra Baxi (that even with all its problems, the movement now appears to be all that we have to interrogate the barbarisms of power)\textsuperscript{12} to struggle as much as we can to analyze that movement in as objective a manner as possible. This need becomes even more urgent and the task even more difficult, when it is realised that, as Mutua has noted, the movement now sits atop a very high “moral plateau”;\textsuperscript{13} what Diane Orentlicher had referred to earlier as the “prestige” that the movement has acquired.\textsuperscript{14}

In another methodological vein, it should also be pointed out here that the analysis undertaken in this article is framed to an important degree by both geographic and temporal limitations. In terms of its geographic limitation, the vast majority of the “primary” evidence that are relied on relate to IHRFF work that has been done in or with regard to some country or the other on the African continent. The choice to limit the collection and analysis of this material to those relating in a significant way to an African country was dictated by the vastness of the aggregate amount of IHRFF Reports out there, and the concomitant need to work with a manageable amount of material. This consideration also informed the decision to impose a temporal limitation on that evidence. As such the vast majority of the “primary” evidence that are relied on in this article are sourced from IHRFF Reports and other documents produced between 2008 and 2013. It is this

\begin{itemize}
\item \textsuperscript{12} U. Baxi: \textit{The Future of Human Rights} (Delhi: Oxford University Press, 2006) at 4 [Baxi, “Future of Human Rights”].
\item \textsuperscript{14} Orentlicher, \textit{supra} note 2 at 83.
\end{itemize}
admittedly geographically and temporally limited collection of evidence and data that constitute the bulk of the primary material that is subjected to a TWAIL analysis in this article.

In order to facilitate the systematic conduct of this analytical exercise, the article is organized into four major segments, this introduction included. Following this introductory section, section II examines the available evidence, data and scholarly insights in order to help decipher the extent (if any) to which more contemporary IHRFF praxis is afflicted (or not afflicted) by one or more of the problematic characteristics or tendencies of international law praxis that TWAIL scholars have long identified and discussed. Following this fairly extensive analysis, an attempt is made in section III to reflect on the lessons which ought to be learnt there from. The main question that is asked and addressed in this section is what should IHRFF become, if its potential is to be fully realised? Section IV concludes the article.

**Viewing IHRFF from a TWAIL Perspective**

This section is devoted to an analysis of more contemporary IHRFF praxis from a TWAIL perspective. The main question here is the extent to which IHRFF praxis is afflicted (if at all) by any of the problematic features of international law praxis identified in the introductory section of this article. To this end, the rest of the section is sub-divided into eight sub-sections, each devoted to a consideration of IHRFF in the light of TWAIL or similarly critical insights regarding one such problematic characteristic or tendency. These problematic characteristics and tendencies are: the heaven/hell binary, the one-way traffic paradigm, fixation on the orientation of the Western gaze, adherence to colonialist styles and approaches, adherence to other problematic methodological approaches, the
unqualified and univalent stigmatization of third world cultures, engagement in a conceptual "economy of appearances," and susceptibility to capture by certain formations or matrixes of global power.

The Heaven/Hell Binary

TWAIL scholars have long critiqued the tendency of international human rights praxis and discourse to foster and reproduce a binary dichotomy that ruptures the globe into two conceptual communities, the one "heavenly" and the other "hellish"; a dichotomy that draws fairly neat and bright lines between "the Good West" and "the bad Third World." These scholars have also shown not just that this binary is in fact not based on fully appreciated reality, but that it is also harmful to the human rights struggle (e.g. by facilitating a human rights monologue rather than a dialogue, and helping to foster...
or augment alienation from the human rights struggle which impedes efforts at generating a measure of mass cultural legitimacy for the human rights project). However, as the TWAIL and other critical literature has convincingly established the existence of this binary and persuasively demonstrated its negative effects on the human rights struggle in general, the re-development of these twin arguments will neither occupy nor detain us here. Rather, what is focused upon in this section is, in the main, an analysis of IHRFF (which is itself only one aspect/dimension of human rights praxis) in order to decipher the extent to which it participates in the (re)production of this problematic heaven/hell binary. A concomitant issue is the degree to which IHRFF thinkers and practitioners ought to remain alert – even in this day and age – to the danger of their participation in its reproduction.

What therefore does the available evidence and analysis suggest about IHRFF praxis’ relationship to the heaven/hell binary? Does IHRFF praxis help at all to (re)produce this neat dichotomy and differentiate in the result between a virtually “innocent West” and a near-absolutely “savage Third World”? One major way in which IHRFF praxis could help (re)produce this heaven/hell binary is through a disproportionate concentration of its activities or operations in the Third World, while focusing relatively little attention on the Western and the most powerful states. This all-too-often leaves the impression in the undiscerning mind that there was very little, if any, real necessity to focus on IHRFF on the Western or most powerful states. In other words, the impression is left that these states escaped IHRFF scrutiny largely because they are in fact “good

19. Many in government circles in the USA have even tended to suggest that this should be the case. See Baxi: “Work in Progress”, supra note 15.
states” that are squeaky clean in the relevant respects. The available evidence suggests that the IHRFF praxis of the major international NGOs is much more globally-focused today than was the case a decade or two ago. Even the unilateral IHRFF of certain countries (especially the USA) are fairly global in ambition – excepting the fact that they do not tend to pay attention to the specks in their own eyes. While a statistical survey of the number of UN IHRFF missions sent to developed and/or very powerful countries as compared to those sent to the weaker Third World states does not indicate that this bias is as present today in UN IHRFF praxis as it once appeared to be, the very fact that a huge majority of such missions/reports target Third World states can function to leave the not entirely accurate impression in the minds of all-too-many observers that serious human rights violations almost always occur in Third World states, thereby crowding out from their minds the pictures of the violations that do occur in and by the more powerful states. Perhaps more importantly,


22. A review of the data on reports and missions sent by the UN to various states between 2008-2012 suggests that 14 of the 276 missions/reports (5.07%) targeted the five veto-power wielding P5 states (a proxy for the most powerful states), which constitute roughly 2.59% of the 193 states UN states; 51 of the 276 missions/reports (18.48%) targeted states which belong to the group of non-P5 developed states, which make up roughly 18.13% of UN states; and 211 of the 276 missions/reports (76.45%) targeted the weaker non-P5 Third World states, which make up roughly 79.28% of UN states. Now, of course, an analysis regarding the rate of incidence of
other statistical measures suggest that the heaven/hell binary may still be as strongly supported by UN-driven IHRFF praxis as ever.23

Another major way in which IHRFF helps (re)produce this heaven/hell binary is through the all-too-frequent failure to foreground Third World’s contributions to, or excellence/leadership in, the development of or respect for certain human rights norms, while highlighting constantly the admittedly numerous instances of the violation of human rights by Third World states. For example, how many IHRFF efforts or reports, if any, have been devoted to the documentation of pro-human rights third world cultural forms and praxis?24 To what extent has IHRFF recorded and disseminated the fact that Rwanda (and not the USA or Britain) holds the all-time world record for the actual implementation of gender equality in representation in Parliament;25 or that the Seychelles, Senegal,

(serious) human rights violations (at best a massive task) might yield a different perspective. But this analysis suffices to give a sense of the intensity or otherwise of focus of UN-driven IHRFF on certain groupings of states.

23. For example, of the sixteen (16) countries to which country-specific rapporteurs (who engage in fact-finding) were appointed by the UN Human Rights Council between 2008 and 2013, only one (Belarus), i.e. 6.25%, could be viewed as a non-Third World state, meaning that a whopping 92.75% were Third World countries. Considering that the appointment of a country-specific rapporteur in respect of a country is one of the strongest measures that the Human Rights Council takes against human rights violating states, this statistic is telling.

24. As is discussed later, a recent attempt to do so by the UN Human Rights Council, through its Advisory Committee, was strongly opposed and treated with great suspicion by many Western Governments and NGOs, including some International NGOs.

25. Women hold 64% of the seats in Rwanda’s current Parliament. See Atlanta Blackstar, online: http://atlantablackstar.com/2013/10/12/rwandas-parliament-has-the-highest-female-representation-of-any-nation-on-earth/;
South Africa, Mozambique, Tanzania, Uganda, and Angola have all far outpaced most non-Scandinavian Western countries (and certainly the USA) in this same regard? Why does Nigeria’s immense contribution (given its meagre resources relative to Western countries) to the human rights project of restoring peace and saving millions of lives in the West African sub-region and beyond tend to be either ignored, or highlighted in the negative, in the dominant human rights-related commentaries, usually when abuses are committed by some of its troops? These sorts of silences, or at best, low decibel acknowledgements, amidst the incessant loudness of the constant highlighting of Third World human rights violations all-too-often helps give the impression that the Third World is almost always a kind of human rights desert, where very little, if any, thirsting for dignity or freedom is quenched, and a kind of near-absolutely benighted region of our world. And so when what is almost always fore-grounded by IHRFF is the “hellish” portion of the Third World picture, and what is constantly back-grounded is the “heavenly” portion of that picture, the impression of the Third World as a near-absolute human rights hell is (re)produced, and when this is contrasted


26. Ibid.
with the extensive fore-grounding of the heavenly aspects of the Western picture, the heaven/hell binary takes firm root.

The One-Way Traffic Paradigm
As a related point, TWAIL scholars have also shown that a logical end-product of a conceptualization of the human rights situation around the world in ways that are framed by a near-absolutist heaven/hell binary is the adherence of international human rights praxis to the one-way traffic paradigm in which human rights knowledge, scrutiny and supervision tends to flow from those parts of the world (i.e., the West) which supposedly invented human rights, which know almost everything about it already, and which observe it almost to the letter, in the direction of those regions of the world (i.e., the Third World) which apparently did not invent human rights, which tend to know very little— if anything — about it, and which hardly ever observe it.28 It has also been pointed out in support of this argument that the US State Department prepares IHRFF Reports on other countries but not on itself;29 that international human rights programs and clinics in North America tend to focus heavily on the Third World and not on their own countries;30 and that the USA at one extreme rarely

thinks of itself as a proper candidate for IHRFF or other scrutiny.31

What then is IHRFF praxis’ specific relationship to this kind of one-way traffic paradigm? Does IHRFF praxis help (re)produce this paradigm? One accusation that has been historically levelled against IHRFF is that it tended to exist in a kind of geo-stationary orbit above the Third World (relative to the degree of attention paid to scrutinizing Western or others among the most powerful states); and that mainstream IHRFF tended to focus to a disproportionate degree on Third World countries.32 As we have seen, IHRFF is no longer nearly as disproportionately focused on the Third World as it once was, although it still does function to an extent to help create the impression that the Third World is a human rights “hell” while the West is a human rights “heaven”. However, as this argument has been developed in the last sub-section, that analysis will not be repeated here. Suffice it to add that the reason this one way traffic persists today (however attenuated in degree) goes beyond the operation and effects of heaven/hell binary, and extends to the effects of the power asymmetries that deeply mark and characterise the relationships among Western and Third World peoples. For example, if Third World subalterns could speak, if they could author the dominant human rights narratives, how would we see the human rights situation in many Western states? And would not more human rights knowledge flow from the Third World toward the West?

It must also be noted that, in any case, whatever the accuracy of the first point above, it is incontrovertible that

there is thus far very little, if any, IHRFF traffic that originates from the weaker (almost all Third World) states and flows in the direction of the richer and stronger (mostly Western and P5) states. Nigerian or Senegalese NGOs rarely, if ever, undertake IHRFF in or about the USA or France; but the reverse occurs near-incessantly. For the reasons that have already been offered in the last sub-section, the much more diverse way in which the UN does its own IHRFF softens, but does not totally blunt this critique.

The problems with this kind of one-way IHRFF traffic are myriad, but only two will be addressed here. The first is that its underlying assumptions (that human rights scrutiny and knowledge only need to flow largely in one pre-determined direction) are factually flawed, and seriously so. The second is that it helps to foster a racialized hierarchy in which Third World societies are endemically and perpetually viewed as the sites of human rights violations and investigations, and Third World peoples are not adequately appreciated as agents of human rights knowledge production, fact-finding, and dissemination. Conversely, it tends to deprive the West of a flow of human rights knowledge and example from the Third World that could benefit it tremendously. For example, what might US women (and even men) have learnt or benefited from the remarkable Rwandan example of actual gender equity in political representation?

Captivation by the Orientation of the Western Gaze

TWAIL scholars have long identified and critiqued the disproportionately constitutive role that the ipse dixit or gaze of Europeans and other Westerners\(^\text{33}\) tends to have on the

\(^{33}\) Just as there is no monolithic Third World, there is, of course, no monolithic West or Europe, and internal dissent and divisions characterize
perceived legitimacy or otherwise of Third World statehood, governance, and practices. A similar argument can be made with respect to IHRFF praxis. Here, the first contention is that the orientation of the “Western gaze” tends to determine, for the most part, the perceived need for, and legitimacy of, IHRFF. It is wherever the Western eye goes, on whatever location its lenses are trained, and whatever it sees, that tends to motivate, frame, constitute and legitimize IHRFF. Whatever the Western eye does not see, is not primed to see, or regards with studied ignorance, does not tend to motivate, frame, constitute and legitimize IHRFF. In other contexts, some have alluded to the agenda setting power of the so-called “CNN effect” (one which is beginning to be countered and balanced by the emerging “Al Jazeera effect”). And so the massive dispossession of black Africans from their lands that continues to haunt life in much of Southern Africa, the brutalization and killing of minorities in highly significant numbers in the inner cities of the USA, the deplorable conditions in which


indigenous North Americans actually live (amidst some of the highest standards of living in the world), or even the socio-economic rights violations that many MNCs perpetrate almost at will in the Third World, have traditionally not tended to motivate, frame, constitute or legitimize IHRFF in nearly as much measure as (admittedly equally important) issues such as torture, freedom of expression, liberty rights, and so on.

It is also important to underlie the fact that a related way in which the Western gaze exerts power and influence over IHRFF praxis is ideational. Whatever the Western eye recognizes as a violation of human rights tends to become widely recognized as such, and whoever the Western eye sees as a pariah, as the “bad guy,” tends to become widely viewed as such, and is more likely to attract mainstream IHRFF. It is thus no wonder that, as we have seen, all but one of the sixteen countries that were subjected to IHRFF by UN Human Rights Council-appointed country rapporteurs between 2008-2013 are Third World states. And while this is on its own not a dispositive fact, it is worthy of note that almost every one of the persons appointed as country rapporteurs in respect of those states during the same period hails from, grew up in, was trained in, or lives or works in a Western country. This is so despite the fact that they are overwhelmingly citizens of Third World states. Here, it does not matter that Third World states in fact make up the majority of the membership of the Human Rights Council or the bulk of its country-rapporteurs. The point here is the ideational power of the Western gaze and perspective, its power to dominate the construction of the reality that is then taken as a given by others. Conversely, whatever the Western eye recognizes as respect for human rights tends to become widely recognized as such, and whoever the Western eye sees as a human rights champion, as
the “good guy,” tends to become widely viewed as such, and is less likely to attract IHRFF. Thus, for example, European land grabs in Southern Africa and the continued control of those highly coveted lands by people of European-descent too often to the serious socio-economic detriment of most of the population — is scarcely seen as an egregious or even serious human rights violation; the re-distribution of such lands is rarely viewed as a form of respect for human rights; the European powers who seized those lands in the first place are hardly seen as bad guys; and the governments that want to re-distribute the lands are rarely lauded as good guys. This ideational effect of the orientation of the Western gaze in turn determines to a large degree where IHRFF focuses its attention and where it travels. The perceived good guys tend to escape tough scrutiny while the apparent bad guys tend to attract it.

It should of course be admitted that IHRFF praxis conducted by many UN bodies, such as the Human Rights Council (HRC), is in general, hardly guilty of being captivated by the Western gaze. The new system of universal periodic review has helped significantly to dull (though not deaden) the effect of the Western gaze on the HRC’s praxis.36 What is more, the majority Third World composition of that body has ensured that many otherwise marginalized human rights concerns (such as the human rights implications of toxic waste dumping, foreign debt, paying ransoms to hostage-takers, and the ways in which cultural values can support the human rights project) have received at least some degree of IHRFF.

attention.37 But HRC-mandated IHRFF on many of these issues are too often opposed or treated dismissively by far-too-many of the Western states and experts, who despite their fewer numbers remain disproportionately influential.38

The Unqualified and Univalent Stigmatization of Third World Cultures

TWAIL and certain other critical scholars have convincingly critiqued as seriously flawed and problematic the way in which mainstream international human rights discourse has traditionally treated "culture", especially the local cultures of third world societies, as if they have "a fixed retrograde valency."39 According to these scholars, since every cultural tradition – more or less – contains within it some norms and institutions that violate human rights as well as others that are

37. For example, see the study conducted by the Human Rights Council Advisory Committee (HRCAC) on the highly controversial issue of "Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind", pursuant to Human Rights Council Resolution A/HRC/RES/16/3 of 8th April 2011. The necessity for this study was apparent to almost all Third World States and some others, but it was opposed to varying degrees by most Western countries and most NGOs. Indeed, many experts on the HRCAC expressed strong reservations about studying the matter at all. The HRCAC’s Report on this study is documented as UN Doc. A/HRC/22/71, of 6 December 2012 [UN Doc.A/HRC/22/71].

38. Ibid. Here, the author relies in part on his own personal observations as a member of the HRCAC.

supportive of human rights, it does not make sense to stigmatize culture (especially those of Third World societies) in a near-absolute, univalent and unqualified way, as almost always violative of human rights, as more or less bad for human dignity, as obstacles to be surmounted, or as a huge part of the problem. Yet, this remains the dominant tendency in international human rights discourse today. Rarely is culture imagined as an important part of the solution. Something constructed as “culture” is too often opposed squarely to something imagined as “human rights,” as if human rights are somehow culture-free and cultures are somehow human rights free. And yet, the conferment of widespread cultural legitimacy on the human rights project has been increasingly recognized as necessary precondition for the abridgment of the wide gap between theory and practice in international human rights law, and the fostering of widespread everyday respect for human rights. And without finding the

40. The discussion in note 37 and the accompanying text regarding the uproar among Western states and NGOs that followed the conferment of the mandate on the HRCAC to study the ways and means of “Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind” is illustrative here. The dominant current in the contributions to the debate on the mandate of those who opposed it was a near-absolute suspicion and characterization of culture as the enemy of human rights. The HRCAC’s report, however, attempted to dispel this notion in part. See UN Doc. A/HRC/22171, supra note 37.

41. See Nyamu, supra note 39 at 392; Okafor, “Attainments,” supra note 39.

42. Ibid.

spaces that local cultural contexts provide for the advancement of the human rights project, this task will be much harder, if not practically impossible.\textsuperscript{44}

As might be expected, IHRFF has not been immune to infection by this virus. As Baxi has observed, we do not as a community “know enough beyond the ‘myth’ of the noble savage in what and which ways a peoples’ knowledge systems are more conducive to the creation /sustenance of human rights cultures.”\textsuperscript{45} Yet, IHRFF has not tended to focus on this question; it has not turned its attention to learning from the subaltern natives what in their cultural traditions promotes or protect (or could be deployed to promote or protect) human rights in their own societies and local contexts. IHRFF has tended to concentrate on the things we know much about already, but not on the things we do not know much about as yet, such as the pro-human rights local cultures of Third World peoples. Similarly, as a form of praxis that is basically designed to locate and disseminate information about human rights violations around the world, IHRFF has understandably tended to focus on human rights violations in the Third World, and not on the contributions made to the human rights project by Third World countries and their peoples. In these ways, mostly through the “gaping” and “loud” silences it authors, IHRFF helps create a widespread sense and experience of Third World Cultures as unqualifiedly and monolithically harmful to human rights.

\textsuperscript{44} Nyamu, \textit{supra} note 39 at 417; Okafor, “Attainments,” \textit{supra} note 39 at 308.

The Production of a Conceptual "Economy of Appearances"

Here, the question is the extent to which the dominant forms of IHRFF do what the critical socio-legal scholar Kamari Clarke accuses (international) law of doing in other contexts, i.e. engagement in the production of a conceptual "economy of appearances" in which a person, group, or country is featured as a culprit (or human rights violator) without necessarily fingerling the full cycle of consumption, exploitation, abuse, and so on, that fed or feed the chain of events that ultimately produced the violation. 46 The question is whether when persons engaged in IHRFF conduct an investigation for a limited number of days in a country (as they tend to do), do the practical economies of time and knowledge (the little time available and the lack of in-depth knowledge of the history and context) that frame their mission tend to impose a problematic or even harmful conceptual economy of appearances that de-contextualizes and therefore distorts their understanding of the situation that is subject to IHRFF? One way to relate this point to real life is by invoking the issue of land reform and re-distribution in places like Zimbabwe, Namibia, and South Africa. For example, why is there a heavy focus (and at times almost exclusively) on the contemporary suffering of scores or hundreds of dispossessed white farmers and far less (if at all) on the centuries-long dispossession and suffering of millions of black Zimbabweans? 47 The two kinds of suffering are important, but why displace this last kind of suffering to a large degree and concentration with the first kind of suffering? Why not focus on the "full cycle", a methodology that would

46. K.M. Clarke: "The Rule of Law through its Economy of Appearances" (2011) 18 Ind J Global Legal Stud 7 at 12.
47. See Okafor, "Attainments," supra note 39.
portray a more accurate story of initial dispossession leading to the on-going restitutive re-possession? However, even when IHRFF has attempted to focus on the full cycle, it does not, in my view, do it in a satisfactory way.\(^\text{48}\)

A Colonialist Style and Approach?

As commentators who work in a range of approaches (including TWAIL Scholars) have long agreed, no asset is more important to a human rights fact-finder than the credibility of her report and her reputation for meticulous methodology.\(^\text{49}\) Indeed, with regard to NGOs (be these international or local) it is quite correct to conclude, as Diane Orentlicher has, “the credibility of their fact finding is their stock-in-trade.”\(^\text{50}\) This is one reason that when it comes to IHRFF, the robustness, meticulousness and acceptability of its methodology matter so much that the praxis has often “come under scrutiny, and at times attack,” and should continue to be subject to rigorous evaluation and critique.\(^\text{51}\) Another reason for placing IHRFF’s methodologies under our watchful eyes is that, needless to say, the conclusions drawn by those who conduct IHRFF often have important (and even serious) consequences for the countries affected, especially when they are weaker Third World states. For example, such states could find themselves relegated to a pariah status, the financial aid they receive could be withdrawn, and invasions could be authorised or otherwise undertaken against them.\(^\text{52}\) It is of

\(^{48}\) Ibid.


\(^{50}\) Orentlicher, supra note 2 at 92.

\(^{51}\) Ibid at 85.

\(^{52}\) Ibid at 84.
course true that many governments, fearful of these kinds of consequences, may have a strong incentive to discredit NGO-produced or other kinds of IHRFF Reports, but this realization should not lead scholars and practitioners of international human rights law alike to give IHRFF a free pass on methodological rigour and acceptability.

In this sub-section, the first set of methodological critiques of IHRFF is developed, albeit briefly. These critiques are based on those aspects of IHRFF methodologies which, in one way or another, tend to remind a TWAIL scholar, like myself, of the colonialist style/approach to treatment of Third World states, accompanied by all of its well-known problems. The first such critique is that, all-too-often, IHRFF is undertaken either at too high an orbit above the relevant Third World state and/or from too far a distance; and that this is still apparent even when the IHRFF includes some kind of field work or mission component. This tends to remind one of the TWAIL critique of the problematic way in which Europeans made and re-made Africa into whatever they wished (at least initially) largely through reading maps rather than through meeting chaps – a theme that has been developed extensively elsewhere.\(^53\) With regards to IHRFF, the issue is that, all-too-often, important conclusions are reached and weighty allegations made against a Third World (or other relevant) state with either no visit at all to the state/location in question, or (as is now more typical) with too short a visit, resulting in allegations that are either de-contextualized or significantly misleading, or both. My analysis of the available evidence

suggests that, on average, UN IHRFF missions tend to last one week; international NGO IHRFF missions (such as those undertaken by Amnesty International) tend to last longer (which is a very good thing) but are sometimes still largely based on reporting from afar; and that although the US State Department’s annual IHRFF Reports are based to some extent on reporting by their staff on-the-ground, too often staff did not appear to have spent adequate time in the particular places/regions within the relevant country that they are reporting on. What is more striking is that too many of these US State Department Reports are often heavily based on arms-length reporting that is grounded on third party reporting (which is often not based on a sustained study on-the-ground). If one was to be less charitable, they might even describe this kind of IHRFF as “drive-by,” or better still, “fly-by” IHRFF. Yet, even the International Bar Association’s Fact-Finding Guidelines implores international human rights fact-finders, such as NGOs, to consider the importance of in-country (i.e. local) knowledge in designing their IHRFF. However, sufficient local knowledge (especially about the many complex societies which are often the focus of IHRFF) cannot be acquired in the typical one-week missions that the

54. See J. Enns: “Research Memorandum on UN IHRFF Reports,” 16 September 2013 (prepared for and on file with the author).
55. See J. Enns, “Research Memorandum on Amnesty International’s IHRFF Reports,” 16 September 2013 (prepared for and on file with the author); and J. Enns, “Research Memorandum on Human Rights Watch’s IHRFF Reports,” 16 September 2013 (prepared for and on file with the author).
56. See J. Enns, “Research Memorandum on the US Department of State’s IHRFF Reports,” 16 September 2013 (prepared for and on file with the author).
57. Ibid.
58. See International Bar Association and The Raoul Wallenberg Institute, supra note 1, at 3.
UN and many other organizations undertake, and this would hold true regardless of the number of weeks spent reading literature on the relevant country, and the extent of reliance on “native informants.” 59 Reliance on satellite imagery cannot cure this effect entirely, and may actually reinforce the “maps rather than chaps” sentiment and substance of such IHRFF. Of course, satellite imagery can, depending on the context, serve as supplemental evidence (as long as a strong emphasis is placed on the word “supplemental”), 60 but this cannot really replace ethnographic best practices such as sustained studies on-the-ground.

What is more, even when IHRFF is based substantially on some kind of field-work in the relevant place, it is still possible to quarrel with certain aspects of the provenance, design and approach of such missions as perhaps unwittingly reproducing a colonialist style and approach. For one, there is too often a high degree of power asymmetry between the observer and the observed, between the fact-finders and their (usually Third World) subjects or targets. The fact-finder is usually in a significantly more powerful socio-political, discursive, and economic position than the subjects of the IHRFF mission. This is clearly so with regard to IHRFF that is conducted by very powerful states such as the USA in the generally much weaker Third World countries. This is also a concern with UN IHRFF, because despite the balanced geographical representation that tends to characterize its IHRFF teams, the UN is still in a significant position of power relative to the


Weaker Third World states and peoples. However, this concern may be less salient with regards to international NGOs, although it is still a significant concern vis-a-vis their relationships with the local NGOs (which are usually more ideationally, financially and socially subordinate) and activists. 61 This kind of power asymmetry may foster an atmosphere of undue deference to the fact-finder in which (through no fault of the fact-finder) the “native informant” feels too beholden, subordinated or intimidated to question the fact-finder and leads the team towards what the informant thinks the team wants to see or hear, resulting in bias in the inexorably large qualitative conclusions drawn by an IHRFF mission. Importantly, rather than eliminating or reducing the relations of power and domination that the Third World natives often experience, this kind of power asymmetry may actually reinforce and augment it, albeit in a different way. 62 It is for such reasons that critical anthropologists and even some international lawyers have long warned against a lack of alertness to the negative effects of the “power-dynamics of the researcher-subject interaction” and “the relationship of inequality between the observer and the observed,” such as the “the power of the researcher to construct the story.” 63

Another such methodological problem is that IHRFF missions to Third World states tend to be either heavily composed of Western or Western-trained fact-finders, or undertaken under the ultimate direction of people of this background. 64 This may, in Mutua’s now famous metaphor,

62. See Bukovska, supra note 59 at 8.
63. See Merry, supra note 11 at 241. See also Viljoen, supra note 5 at 52.
64. As has been previously noted, all but one UN country rapporteur in office between 2008 and 2013 was a Western national, lived and worked in the
evoke the image in some observers and produce the experience in some participants, of the Western or Westernized “saviour” looking to find facts from the locals in order to author a script that will lead to the rescue of Third World “victims” from their own “savages”; a familiar colonialist relational structure. There are, of course, all kinds of problems with this type of relationship, but suffice it to say that at the very least, it can bias fact-finding results by imposing on it only one kind of broad perspective, and filtering it through only one kind of broad prism. This is especially so because fact-finding and the reporting that is based on it necessarily involves a degree of qualitative input. However, it should be noted that some aspects of UN Human Rights Council-driven IHRFF, such as those conducted by working groups and the Universal Periodic Review (“UPR”) that is handled by the Council itself, with their usually geo-politically balanced teams, may not be as susceptible to this kind of critique as other forms of IHRFF. And although, the identities of the particular researchers who conducted the mission is often left unclear, and much remains to be done in this direction, even the large international NGOs seem to have begun to adapt their craft to blunt some of this criticism by ensuring more balance in their IHRFF teams. Nevertheless, it bears re-iteration that even if

West, or was trained in a Western country. US State Department IHRFF is basically conducted by US officials. And even the international NGOs are undeniably Western-dominated.

65. See Mutua, “Savages”, supra note 15; Merry, supra note 11 at 242.
66. See Orentlicher, supra note 2 at 95.
68. See for e.g. Human Rights Watch, “‘They are Killing Us’: Abuses against Civilians in South Sudan’s Pibor County,” Sept 2013 at 45.
the UN, US State Department, and the international NGOs could escape the criticism that their teams are dominated by Westerners, they usually cannot escape the attack that these teams tend to be heavily populated by Western-trained persons. The point here is not that a Western-trained person or even a Westerner cannot bring a different "non-mainstream Western" lens to the subject, but that this is usually less likely to occur than when s/he is immersed in the Western idiom and experience.

**Other Problematic Methodological Issues**

Three methodological questions are discussed here which may be asked of IHRFF but do not necessarily or easily relate to the colonialist style or approach. These relate to the question of selectivity in the choice of targets of IHRFF; the role of subjectivity in our inexorably qualitative IHRFF system; and the standards of proof that ground IHRFF conclusions. These will be examined once after the other. With regard to the issue of the selection of the subjects of IHRFF, of the peoples and places where IHRFF is to take place (an issue also encountered in anthropology\(^69\)), it must be acknowledged at the outset that UN, NGOs, and individual state-driven IHRFF have come a long way from the time they were focused almost entirely on the "other", who was usually located in the Third World. UPR has appreciably reduced selective IHRFF at the UN; the largest INGOs now tend to survey most states in the world on an annual basis; and even the US annual country reports are near-universal in geographical scope.\(^70\) Yet, there is still some

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69. See Merry, *supra* note 11 at 254.
way to go towards achieving a sufficient degree of fairness (with more evenness) in the selection of the targets of IHRFF by any of the afore-mentioned categories of fact-finders. For instance, as has been noted – despite the onset of the UPR mechanism – the analysis of the available UN data suggested that almost every single country rapporteur in office between 2008 and 2013 targeted a Third World state.\(^71\) The analysis of the available evidence regarding the largest international NGOs also suggested that although they do tend to issue annual surveys that target developing and developed states alike, the other kinds of reports issued by them are still (deservedly or otherwise) focused for the most part on the Third World.\(^72\) The problems with the seemingly selective targeting of certain (usually Third World) states for IHRFF have been so adequately discussed in the literature that they will not be reheashed here. It is sufficient to point out that: (a) it was these kinds of concerns that in part led to the most far-reaching reform of the UN human rights system since 1945 (leading to the creation of the UPR system),\(^73\) and that (b) it is well-acknowledged that such selectivity tends to denude the popular legitimacy of IHRFF among important actors and even population areas in the world.\(^74\)

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\(^71\) See sub-section 1 of this section of the article.

\(^72\) For e.g., while about 54 of the 58 other kinds of reports issued by Human Rights Watch in 2013 (as at 27 October 2013), i.e. over 93%, targeted Third World countries, only about 4 of these 58 or so reports, i.e. 6.9%, targeted non-Third World states. Yet, Third World States only make up about 78% of the total number of states in the UN.

\(^73\) For instance, see the commentary of the Child Rights Network on the UPR system, online: http://www.crin.org/HRC/UPR.asp (30/10/2013).

\(^74\) For e.g., see Orentlicher, supra note 2 at 98.
With regards to the issue of the role of subjectivity in our inexorably qualitative IHRFF system, Frans Viljoen put it well when he reminded IHRFF practitioners that they “should be aware of their active role in constructing a social reality” in the course of their work.75 Viljoen is also correct when he declares that while IHRFF practitioners often put their best efforts and do want to examine the relevant situations in as objective a manner as they possibly can, “on the whole, though, fact-finding is inherently subjective and depends on a multiplicity of factors relevant to the construction of the factual world.”76 The point here is not merely that IHRFF in its living forms (as opposed to IHRFF in theory or on article) is inexorably qualitative, a point that is well-acknowledged in the literature and which has been reiterated by at least one senior international human rights activist,77 but also that its findings and conclusions are also co-constructed – often unwittingly – by the very persons who are in theory objectively “looking” at the reality in the relevant place or society. The act of “knowing” is inherently mediated by a host of subjective factors and intermediaries, and IHRFF is not immune from this mediation process. From the choice of places to visit or witnesses to interview, to the analysis of the “evidence” gathered, the fact-finder’s background perspective on the target place and people, her opinions on the issues at hand, her training, her biases (or even her prejudices) seep into the process of decision-making (e.g. the processes of believing some witnesses over the others, or forming conclusions). For example, an opinion on whether a glass is half-full or half-empty at a given point in time is an inexorably qualitative and

75. See Viljoen, supra note 5 at 52.
76. Ibid.
77. See Orentlicher, supra note 2 at 95.
constructed conclusion. But what really is the problem with this, one may ask? The main concern with the way in which the fact-finder’s background biases (or even prejudices) seep into the process of IHRFF is, for example, that the biases that most people (including all-too-many Africans) seem to have about Africa tend to be very negative in most respects, too often blinding them to the positives about the peoples and places there, thereby significantly distorting and even falsifying to a degree their findings and conclusions. And since human rights fact-finders are a part of the societies in which they live and function, IHRFF cannot possibly be entirely immune to this problem. Regardless of their factual accuracy, one only needs to think of the rampant talk largely in uncomplimentary tones about the “Dark Continent” or the “Hopeless Continent” to understand this point. More specifically, Tiyambe Zeleza has noted the way in which human rights discourse tends to speak and write about Africa and Africans almost always in terms of their “lack” of something. Further, Mutua has demonstrated the way in which Africa and Africans continue to be viewed, more often than not, as either savages or victims who inhabit a benighted world in desperate need of saviours from elsewhere, usually the West. These conclusions also apply to the relationship between the human rights movement and most of the Third World. Thus, much vigilance is required to ensure that IHRFF controls for the negative background images that all-too-many people wittingly or unwittingly bring to their analysis of

81. Ibid.
events in Africa and most of the Third World; biases that can refract and distort the reality.

With regards to the issue of the standard of proof required to determine that a piece of information that is offered by a witness being interviewed in a process of IHRFF is factual, Theo Boutrouche once stated that the most commonly used standard is proof on a balance of probabilities.\footnote{See Boutrouche, supra note 1 at 9.} If this was so in all cases, and there was clarity in the understanding of its meaning, then there would not a problem with IHRFF in this regard. However, an examination of the first report issued by the Independent International Commission of Inquiry established by the UN Human Rights Council to investigate the serious abuses of human rights and humanitarian law allegedly committed in Syria in the last few years appears to suggest that there remains some confusion regarding the standard that should be adhered to, and what it means precisely. Indeed, while that report explicitly states that “on the specific issue of what the facts of human rights violations” in Syria were (and not on the question of the identity of perpetrators), the standard of proof it used was merely one of “reasonable suspicion”\footnote{See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, at para 5; T. Marauhn: “Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict - The Case of Syria” (2012) 43 Cal W Int’l LJ 401 at 426.} this standard was applied in its subsequent reports, but described differently as “reasonable grounds to believe.”\footnote{See for e.g., Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/19/69, 22 February 2012, at para 10; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/21/50, 16 August 2012, at para11.} It is unclear how widespread this confusion is.
regarding the standard of proof to be utilized, since — as Boutruche has noted — most IHRFF reports do not adequately discuss the standards of proof adopted in preparing them. Nevertheless, whatever the extent of the confusion, at least one danger is apparent: if a state is one of the “usual suspects”, one which is already viewed widely as belonging to the club of “human rights violators,” the mistaken use of a standard that is lower than “reasonable grounds to believe,” would mean reliance on a standard that is largely grounded on suspicion and not fact. This would place the target state at grave risk of unfair and inaccurate stigmatization. This danger of unfair stigmatization is compounded when reports that are based on the first report (no matter how carefully calibrated and crafted) reiterate the suspicion expressed in the first report as if it was in fact already proven on a balance of probabilities or even beyond a reasonable doubt. It should be noted, of course, that if a state walks tall among the group of “innocents” which (whatever their record) tend to be viewed in general as respecters of human rights, then this risk is much more remote.

Susceptibility to Capture by Global Power
Apart from TWAIL scholars who have demonstrated or noted the relationships among human rights movements and global networks or matrixes of power (hereinafter “global power”), at least one senior international human rights activist has acknowledged the rather obvious fact that the movement’s

85. See Boutruche, supra note 1 at 10.
orientation and activities (including those related to IHRFF) can have highly important consequences for the behaviour of global power toward weaker (especially Third World) states. For example, development aid can be, and has been, cut off in part as a result of one or more IHRFF reports. Such aid can, in the result, also be subjected to more or less tough conditions. The recent experience of Rwanda is a case in point. Similarly, NGO IHRFF has been known to bolster the position of lobbyists who want a powerful regime to take one course of action or another, sometimes against a weaker state. Thus, IHRFF often provides information to powerful governments for use (for good or for ill) in their policy and decision-making processes. These are but a few examples of the relationships between IHRFF and global power.

However, this is not, of course, to suggest that human rights fact-finders always or mostly set their task with a view of serving the interests of global power. Indeed, it is an obvious fact that NGO fact-finding reports, for instance, have too often contradicted and annoyed many a powerful government, including the most powerful of them all. The same can be said for some UN human rights reports.

87. See Orentlicher, supra note 2 at 84.
88. Ibid.
89. Ibid.
92. See Orentlicher, supra note 2 at 86.
93. Many of the Reports submitted on the dumping of hazardous waste by former Special Rapporteur of the UN Commission on Human Rights, Ms. Fatma-Zora Ouhachi Vesely: had this effect on some powerful states. See for e.g. UN Doc.E/CN.4/2004/46/Add.1 of 22 December 2003.
point here is that, whatever the underlying intent may be, all-too-often IHRFF praxis does in fact service (or at least reflect) the interests and configuration of global power to a significant extent. This is easily shown and should hardly be controversial among discerning observers of the international scene.

For one, it has long been acknowledged that IHRFF often produces the justification for more powerful actors to decide to exercise what has come to be referred to, rather too optimistically, as their “responsibility to protect” (however secondary in nature that responsibility is). Again the point is not whether or not the specific instance of IHRFF was designed to perform this role, but that IHRFF praxis will need to be more careful about this capacity of global power to influence, or worse still manipulate, the otherwise genuine desire of the human rights movement to expose human rights abuses. For example, it troubled not a few people how the plight of Afghan women under the Taliban suddenly assumed centre-stage as one justification for the invasion and occupation of Afghanistan. Secondly, many have noted the disproportionate influence of powerful Western and/or veto-power endowed governments, as well as the powerful international (read largely Western) NGOs on the human rights movement in general and on IHRFF in particular. Others have commented on the fact that human rights (and by


extension IHRFF) can hardly be discussed intelligently without analyzing the disproportionate influence of powerful large donors based primarily in Europe and the USA who promote certain preferred human rights projects over others. 97 Again, it appears that, just like its parent discipline, IHRFF praxis is quite weak at disciplining global power (even in a Foucauldian sense). 98 How many times, one may ask, has a veto-power endowed (or P5) state been subjected to serious IHRFF by the UN Human Rights Council or a large international NGO (especially one that led to significant consequences)? The answer is “rarely,” if one goes by the number of times the most severe Council measure of the appointment of a country rapporteur has been applied, but changes to “often” if the less severe UPR is utilized as the measure. With regard to IHRFF by the international NGOs targeting these states, the answer is - as we have seen – quite similar. How many times have the stronger Western states been subjected to such IHRFF? Going by the same measures, the answers appear not to be dissimilar from the ones offered above. One is then tempted to ask: is it because of its relative capture by global power that IHRFF appears to be complicit to the degree that seems evident in global power’s construction of factual and normative fabrics and landscapes which enhance the latter’s dominance over global affairs?

The overall point here is that IHRFF practitioners need to continue to worry and even perhaps more so, that power refracts the picture of the world we typically receive and reproduce. For example, Nigerians or Indian NGOs typically don’t have the resources to go do IHRFF in any kind of sustained way in US inner cities, France’s Parisian suburbs, or

97. See Riles, supra note 39 at 18.
Chechnya. As such the uncomplimentary pictures of those places are not as fore-grounded as they could have become were this the case. Is it then capture by global power that IHRFF does not tend to fore-ground these images and thus bolster the resistance of the subalterns in US inner cities?

What Should IHRFF then Become?
It is no secret in informed circles that IHRFF has for long been troubled by certain difficulties and problems. For example, Phillip Alston had long characterised IHRFF as methodologically inconsistent, ad hoc, and often unsatisfactory. It was as a result of similar conclusions regarding the state of the art of IHRFF that a host of early scholars, commentators and organizations made important efforts to propose ways and means of designing, composing and conducting IHRFF in the best possible way. Even as of the 1980s, a measure of consensus had developed in the academic literature that IHRFF needed to abide by some basic principles, howsoever informal these may be, and whatever the risk of over-standardization.

Examples of these proposals include those made separately by Thomas Franck and Scott Fairley, and Dianne Orentlicher. One of the main contributions made by Franck and Fairley was to propose that in order to ensure the impartiality of IHRFF (something that is highly essential for its legitimacy and effectiveness) much care should be devoted to five core issues, namely: the choice of subject-matter of investigation; the choice of mission members;

99. See Alston, supra note 3; Talsma, supra note 3 at 402.
methodology of investigation; the comprehensiveness of the terms of reference; and the way the mission’s report will be utilized. ¹⁰¹ For her own part, Orentlicher had urged that IHRFF missions should avoid a politically-biased selection of witnesses; draw upon a broad, diverse and representative range of sources; use a large enough sample of testimony; corroborate direct testimony; and utilize knowledgeable secondary sources in the relevant locales (e.g. domestic NGOs, lawyers, foreign diplomats, and journalists). ¹⁰²

Much more recently, innovative proposals for the strengthening of IHRFF have been made in the writings of scholars such as Alston and Gillespie, and Land. Alston and Gillespie have proposed the greater use of technology to deepen pluralism in IHRFF and bring in local (especially Third World) activists more meaningfully into the international aspects of that praxis. ¹⁰³ More specifically, they have, for example, called for collaboration among international NGOs toward the production of something that is akin to international human rights Wikipedia. ¹⁰⁴ For her own part, Molly Land has lauded the developing trend toward peer-based production of human rights reports which are then posted onto international e-platforms (such as the various Wikis or “the Hub”) by many of those – usually in the Third World – who were traditionally the subjects, and not the agents, of IHRFF (although she notes that credibility issues remain and warns that the most

¹⁰². See Orentlicher, supra note 2 at 109.
¹⁰⁴. Ibid.
uneducated and poorest populations in those places may still not be able to participate in nearly as much measure in these innovative and pluralizing IHRFF activities as the more elite segments).

But despite all of these attempts to make proposals for the reform, systematization and improvement of IHRFF, and the many important improvements that have actually been made to it, it appears that IHRFF praxis still remains significantly challenged to this day by methodological and other difficulties and problems. As one author has put it, even the UN (which began efforts to think through and reform its IHRFF as far back as 1970, which adopted a Code of Conduct for some of its fact-finders as recently as 2007, and which has made other reform efforts since then) has not as yet succeeded in achieving much coherency in the methodology of IHRFF. 105

Against this backdrop, the rest of this section is devoted to pointing to some guideposts and markers that frame and thus help define more ideal IHRFF (as seen through a TWAIL prism). It should be stated at the outset that there is no pretence here that this exercise is a comprehensive one, or that it identifies all the possible characteristics of “ideal IHRFF” – either in a TWAILian sense or howsoever it is conceived. First, it must be pointed out that TWAIL would generally not argue for less IHRFF, but would in fact speak in favour of more of that praxis (albeit in its more ideal form). This point is decipherable from the discussions in the last section of this article on the problems with an adherence to the heaven/hell binary and the one-way street paradigm; and the problematic nature of the fixation of much IHRFF on the orientation of the Western gaze. The major point here is that IHRFF needs to

105. See Talsma, supra note 3 at 402.
continue expanding its geo-political focus even more than it already has, well beyond the usual (Third World) suspects.

Second, as Frans Viljoen has correctly argued, an IHRFF report “should be regarded as the outcome of a discursive contest in which the fact-finder plays a co-constitutive role.” Against this background, ideal IHRFF (as seen from a TWAIL perspective) would be designed and conducted by a team that is— as much as possible— geo-politically and ideologically balanced. This kind of balancing would contribute greatly to the “objectivity” of the fact-finding process, or at least it credibility, and would bolster the global legitimacy of IHRFF, and augment its effectiveness in the long-run. Problems related to the fixation of much IHRFF on the Western gaze, and the one-way traffic paradigm, would also be ameliorated in the result. And although the UN Human Rights Council prides itself as steeped in such balancing praxis, it should not be forgotten that it currently has over forty individual, i.e. one person, special rapporteurs (excluding the admittedly balanced “working groups”). The largest INGOs engage in this kind of balancing, to an extent, but in the view of Viljoen’s unassailable point, this practice should become much more systematized and widespread.

Third, IHRFF should become more and more like UPR, and less and less like its former, very ad-hoc, and mostly selective, self. For sure, IHRFF has come far from its earliest days when it was widely criticized for its excessive selectivity. While hardly perfect in this regard, UN IHRFF (mainly

106. See Viljoen, supra note 5 at 52.
because of the UPR system) and to some extent the IHRFF of the largest international NGOs, have become more universal than they used to be and therefore less narrowly focused in geo-political terms. Thus, the UPR system is a practical response that can help blunt the Western gaze, heaven/hell binary, and one-way street paradigm critiques, among others, and should be popularized among practitioners of IHRFF, and well beyond the UN system.

Fourth, despite the obvious resource constraints, from a TWAIL perspective, I would argue in favour of the intensification of the method of country-visits; i.e. the devotion and utilization of more substantial periods of time, and in a more sustained and repeated way, to each IHRFF mission. The UN, international NGOs, and even the US Department of State should be commended for at least using this method to some extent and to varying degrees. But as has been noted, the ways in which it has been used to date still tends to be far from satisfactory.

And so, the fifth point is that there is a sense in which ideal IHRFF would – from a TWAIL perspective – look more like the best kinds of (critical) ethnography. Anthropologists like Sally Engle Merry have noted the striking similarities between much IHRFF and much ethnography. As she has put it, “Human rights activism [including IHRFF] typically relies on forms of data collection and research such as surveys, personal narratives, and case studies that are similar to research methods used in anthropology.” Yet, as these same scholars have also observed, there are nevertheless significant differences between the two fields of endeavour. For, as Merry has also noted, “successful activists focus on telling

109. See Merry, supra note 11 at 241.
compelling personal cases with simple story lines of suffering and responsibility...designed to generate outrage and action...Academics are more likely to tell more complex, even involuted stories.” 110 Put differently, academics have to use nuance and intricacy while activist stories tend to be straightforward and emotionally engaging. 111 Given the inescapable reality that IHRFF often has to deal with complex situations that defy simplistic or linear story lines, the search for more credible IHRFF conclusions should be bolstered by a greater degree of adherence to the academic ethnographer’s approach: The point here is that the more IHRFF begins to look like the best ethnography, the more credibility it will have in the long term, whatever the short term benefits of deploying the current techniques of oversimplification, in order to appeal to the consciences of the audience. This should not require IHRFF to become the exact same thing as critical ethnography but rather that IHRFF simply needs to move farther along in that direction.

In a similar vein, the sixth point is that IHRFF needs to become even more alert to the dangers of operating from a high orbit or on a long-distance plan. For, clearly, the intricacies of the local human rights condition are not as easily observed or appreciated from a far way off or from a thirty-thousand feet altitude. The potential for error is far greater at this height and distance, no matter the power of the long-distance lens that is used. Once it is realized that IHRFF can have grave consequences for the target country or people, the importance of holistic accuracy becomes even clearer. However, such a degree of accuracy cannot be achieved regarding complex social realities without the kind of deep-

110. Ibid at 241.
111. Ibid,
textured local knowledge that can only come from close engagement with the target population or phenomenon, usually on the ground.\textsuperscript{112} With regards to accuracy, such deep local knowledge can at times be almost the full picture. This is why delicate care should be exercised regarding the increasing turn to satellite imagery to provide key evidence of violations.\textsuperscript{113} Satellite imagery should at best be deployed as a supplemental, if not marginal, tool.

Seventh, IHRFF needs to do more to reduce the conceptual economy of appearances that tends to characterize and limit its ability to reach as deep an understanding of the given situation as it could. In this vein, fact-finding should balance contemporary information gathering with socio-historical contextualization.\textsuperscript{114} Only in this way can it capture the “complicated and manifold circumstances” that shaped and underlie the situation being observed during a mission.\textsuperscript{115} Here again, critical ethnography – with its tradition of in-depth focus on the meanings and practices of small social spaces – may provide a model, or at least a guide, for IHRFF.\textsuperscript{116}

Eighth, seen from a TWAIL perspective, ideal IHRFF would be more careful about its susceptibility to deployment and manipulation by global power to achieve ends, which are in many cases significantly different from its intent. There is not, of course, all that much that IHRFF practitioners can do about this in many instances. However, IHRFF practitioners still need to be as reflexive as they can about this possibility,

\textsuperscript{112} See IBA, supra note 1 at 3.
\textsuperscript{113} See Alston and Gillespie, supra note 103 at 1113.
\textsuperscript{114} See Boutruche, supra note 1 at 6.
\textsuperscript{115} See Bukovski, supra note 59 at 11.
and seek to limit any such potential danger of capture in any way they can. For example, IHRFF can be more careful about making pronouncements in certain cases, and may need to take more time to study the relevant situations rather than rush to issue press releases and statements based on preliminary studies, that are then re-circulated by others as “gospel truth,” and deployed by global power in unintended ways and as means to other ends.

These are some, and clearly not all, the guideposts to designing and conducting “ideal IHRFF”, that could be offered to IHRFF practitioners from a TWAIL perspective.

Conclusion
In conclusion, all that remains to be reiterated is that the main point of the above exercise is not just to point practitioners and academics interested in this area in the direction of the guideposts of what could be considered ideal IHRFF praxis, from a TWAIL perspective, but to also identify and develop tendencies against which, at a minimum, we all ought to remain significantly alert to. Certainly such tendencies should be combated where they do manifest, but it is also important to guard against their manifestation in the first place through good IHRFF design and practice. As such, the broader point that this article makes is not necessarily that every type or iteration of contemporary IHRFF is guilty of one of the pitfalls identified in this article, but that good reasons remain for all such IHRFF praxis to stand sentry at the gates of their crafts, lest they become affected by the problems discussed here.

Having said this, it must be acknowledged that IHRFF does present a number of unique or serious challenges to the investigator, and that this will invariably limit overall success in achieving ideal IHRFF as conceived in this article. Yet, this
realization ought not de-mobilize us from making every effort to fashion a set of standards to which investigators should aspire.\(^{117}\) For as Thomas Franck once remarked, cleverly I must say, "a system's reach must exceed its grasp, or what's a heaven for?"\(^{118}\)

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117. See Steinberg, Hertzberg, and Berman, supra note 3 at 89.