

Open Society Justice Initiative

OPTIONS FOR JUSTICE

**A Handbook for Designing
Accountability Mechanisms
for Grave Crimes**

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PREFACE

Hans Corell

Former UN Under-Secretary-General for Legal Affairs and Legal Counsel

In the field of international criminal justice, we have seen a tremendous development over the last 25 years. It started with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Four years later, in 1998, the Rome Conference adopted the Rome Statute of the International Criminal Court (ICC). This was then followed by the agreements between the United Nations (UN) and Sierra Leone on the Special Court for Sierra Leone (SCSL) in 2002, and then between the UN and Cambodia on the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003. There are many additional experiences in this field, including purely national proceedings in such places as the Democratic Republic of Congo and Argentina, and internationally assisted domestic proceedings in such places as Bosnia. But the examples I mention at the outset are very special to me, since I was directly involved in these efforts during the years when I was the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations in 1994–2004.

In the ensuing years, both the United Nations General Assembly and the Security Council have further entrenched norms of criminal accountability for the gravest of crimes. They have done this, in part, by adopting resolutions that emphasize the importance of the rule of law at the national and international levels. By way of example, reference could be made to the declaration adopted by the high-level meeting of the General Assembly on September 24, 2012 (A/RES/67/1).

In this resolution, heads of state and government and heads of delegation reaffirm their solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, all of which are indispensable foundations for a more peaceful, prosperous, and just world (para. 1). They further reaffirm that human rights, the rule of law, and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations (para. 5). In addition, they state that they are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development,

the eradication of poverty and hunger, and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law (para. 7). They also reaffirm the principle of good governance and commit to an effective, just, nondiscriminatory, and equitable delivery of public services pertaining to the rule of law, including criminal, civil, and administrative justice; commercial dispute settlement; and legal aid (para. 12).

Of particular interest in this context is that they commit to ensuring that impunity is not tolerated for genocide, war crimes, and crimes against humanity, or for violations of international humanitarian law and gross violations of human rights law. They also commit to ensuring that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law. For this purpose, they encourage states to strengthen national judicial systems and institutions (para. 22).

It should be emphasised that in a system under the rule of law, the protection of human rights and ability to deal with serious crimes through a proper criminal justice system both at the national and international levels are core elements.

From the vantage point of 2018, such language may strike many working in the field of international justice as relatively unremarkable. It is, however, worth recalling that the understandings now enshrined in UN resolutions were, not so long ago, far from self-evident. For those with backgrounds in domestic justice systems, they may still not be.

When I joined the United Nations as Under-Secretary-General for Legal Affairs and Legal Counsel, I had been a judge in my country, Sweden, for some 10 years, from 1962 to 1972. The main focus of the work in these courts was criminal law. In 1972, I joined the Ministry of Justice to do legislative work, and after 13 years in this ministry, the last three years as its Chief Legal Officer, I became the Legal Adviser of the Ministry for Foreign Affairs in 1984, a position that I held until I joined the United Nations.

In August 1992, the Conference on Security and Cooperation in Europe (CSCE), now the Organization for Security and Cooperation in Europe (OSCE), appointed me and two colleagues as war crimes rapporteurs in Bosnia and Herzegovina and Croatia. My colleagues were Ambassador Helmut Türk, the Legal Adviser in the Ministry for Foreign Affairs in Austria, and Gro Hillestad Thune, the Norwegian member of the Council of Europe Commission of Human Rights. On February 9, 1993, we

presented our final report: *Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia*. In this report, we proposed that a war crimes tribunal for the former Yugoslavia should be established on the basis of a treaty. This was the only legal avenue for the CSCE. At the same time, the question of establishing such a court was discussed in the UN Security Council. The CSCE therefore immediately forwarded our proposal to the United Nations. On February 22, 1993, the Security Council decided to establish the ICTY, mainly on the basis of a report just delivered by a UN Commission of Experts.

The reason I mention this here is that, as a judge at the national level, I was very doubtful about the idea of international criminal courts. I thought that they would be too politicized and that it would be difficult for such courts to deliver justice in a safe and secure manner. However, I completely changed my mind when I was charged with serving as war crimes rapporteur in the former Yugoslavia. I realized that nobody was doing anything about bringing to justice those who were responsible for the crimes that I had identified during our visit to Croatia. At the same time, I had become more aware of the interdependence between the rule of law and criminal justice. One of the major challenges in the future, if we want to create a world where people can live in dignity with their human rights protected, is to establish an effective criminal justice system at the national and international levels.

Against this background, it was with great interest that I read *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes*. With reference to the experiences over the years analyzed in the handbook and the requirements relating to the rule of law reaffirmed by the General Assembly of the United Nations, it is obvious that there will be a need for additional mechanisms to deal with the impunity that actually breeds new conflicts in the world. There are clear demands for justice from Syria to Sri Lanka, from El Salvador to South Sudan. It is therefore of the utmost importance to make use of the experiences of the institutions that have been established so far when designing new mechanisms.

The manner in which the handbook is organized should be of great assistance here. What I found particularly helpful is the way in which the material is presented: a summary of what is being examined, experience to date, lessons and considerations, and a key questions to make a determination in the subject matter. This will greatly assist those concerned. In particular, the key questions should assist in focusing on the specifics of the situation at hand. As stated in the handbook, these questions should serve as a checklist.

The value of comparative experience when designing new mechanisms and the need for models tailor-made to the particularities of each situation cannot be overemphasized. Of particular importance is that there will be a need for new models, despite the existence of the ICC.

Needless to say, I read the analyses of the institutions mentioned above with specific interest. The analyses are very much along the lines of my own assessment of the situations. This applies in particular to the analyses of the SCSL and the ECCC, where I represented the United Nations as chairman of the UN delegations responsible for negotiating the agreements with the two host states. The handbook takes note of serious flaws in the ECCC's design, and in my view, in the future, the United Nations imprint should not be given to institutions over which the organization does not have full administrative control. While I believe that the ECCC is not a model to be replicated, the handbook details the negative lessons while also noting some positive innovations.¹

The purpose of this handbook is twofold: (1) to assist policymakers in deciding whether to establish or support a justice mechanism, and (2) to assist those who are charged with the task of developing models once the policy decision is made. In the latter category, we will find: state officials and diplomats, national investigation and prosecution authorities, staff and officials of the United Nations and other inter-governmental organizations, and those who work for national and international nongovernmental organizations. In my view, the handbook will serve these categories well. The policymakers are well advised to keep in mind also the requirements relating to the rule of law reaffirmed by the General Assembly of the United Nations and the commitments mentioned above.

Finally, there are three elements that I often reflect on when it comes to establishing criminal justice mechanisms: languages, the principle of legality, and financing.

With respect to languages, it is very important to keep in mind what is said in the handbook: that having too many official languages can cause delay and raise costs. One single additional language will have a dramatic impact on the costs for the institution contemplated.

1. I have further developed my thoughts on this in my introduction to *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals*, ed. David M. Crane, Leila Sadat, and Michael P. Scharf (Cambridge: Cambridge University Press, forthcoming), see cambridge.org/9781108424165.

With respect to the principle of legality, in addition to what is said in the handbook, reference should be made to Article 15, second paragraph of the International Covenant on Civil and Political Rights:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The existence of the Rome Statute is an important clarification in this respect. I also think that the fact that the UN Security Council, on May 25, 1993, adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia must be taken into consideration when this provision is construed today (S/RES/827 [1993]).

With respect to financing, I realize that this sometimes has to be organized through voluntary contributions. However, as I have said in the past, I was deeply concerned that the funding of the SCSL was not made through assessed contributions. There is actually a constitutional element here too, which becomes apparent if one makes a comparison with funding of courts at the national level. What credibility would national courts have if they were funded by different donors and not from taxes or similar official revenues? It is obvious that the same reasoning should be applied at the international level. In my view, this is an element that should be borne in mind in designing new mechanisms.

These are just some of the lessons that I find to be of particular importance. There are many others found throughout this valuable handbook. Which lessons are most salient will depend on a given context. This handbook has content relevant to those designing accountability mechanisms for grave crimes in any location and under any circumstances. In the future, it should be possible to design smarter, more effective and efficient mechanisms to enforce the mounting expectation of criminal accountability reflected in international law.

LIST OF ABBREVIATIONS

ABA-ROLI	American Bar Association Rule of Law Initiative
ACJHR	African Court of Justice and Human Rights (proposed criminal chamber)
AI	Amnesty International
ATS	Alien Torts Statute
AU	African Union
BiH WCC	Bosnia and Herzegovina War Crimes Chamber
CICIG	<i>Comisión Internacional contra la Impunidad en Guatemala</i> (International Commission against Impunity in Guatemala)
DESA	United Nations Department of Economic and Social Affairs
DPG	Development Partners Group (Uganda)
EAC	Extraordinary African Chambers (Senegal, for Chad Hissène Habré and ors.)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCL	Extraordinary Criminal Court for Liberia
EU	European Union
EULEX	European Union Rule-of-law Mission in Kosovo
FIDH	<i>Fédération Internationale des Droits de l'Homme</i> (International Federation for Human Rights)
GIEI	<i>Grupo Interdisciplinario de Expertos y Expertas Independientes</i> (Interdisciplinary Group of Independent Experts, Mexico)
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	International Crimes Division (High Court, Uganda)
ICJ	International Court of Justice
ICT	International Crimes Tribunal for Bangladesh
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHT	Iraqi High Tribunal

IIIM	International, Impartial and Independent Mechanism (Syria)
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JPL	Justice and Peace Law (Colombia)
KLA	Kosovo Liberation Army
KWECC	Kosovo War and Ethnic Crimes Chamber
MENA	Middle East and North Africa
OLA	Office of Legal Affairs (UN Headquarters, New York)
OSJI	Open Society Justice Initiative
Reg. 64 Panels	Panels Constituted under Regulation 64 of the United Nations Mission in Kosovo
SCB	Special Chamber for Burundi
SCC	Special Criminal Court for Central African Republic
SCIT	Special Crimes Investigation Team (East Timor)
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit (East Timor)
SITF	Special Investigative Task Force (EULEX, Kosovo)
SJP	Special Jurisdiction for Peace (Colombia)
SPSC	Special Panels for Serious Crimes (East Timor)
STK	Special Tribunal for Kenya
STL	Special Tribunal for Lebanon
SWCC	Special War Crimes Chamber (Serbia)
UN	United Nations
UNC	Charter of the United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNMIK	United Nations Mission in Kosovo
UNMIT	United Nations Mission in Timor Leste
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTAET	United Nations Transitional Administration in East Timor

I. INTRODUCTION

Emergence of Accountability Mechanisms for Grave Crimes

In the aftermath of World War II, the victorious powers created the first mechanisms dedicated to holding some perpetrators of grave crimes criminally accountable. The Nuremberg and Tokyo trials, which largely took place between late 1945 and 1947,² provided hope that future grave crimes would be punished. Perhaps the prospect of criminal justice could even deter such crimes, which were being defined by an emergent field of international criminal justice. However, soon after the conclusion of the Nuremberg and Tokyo experiments, the Cold War dawned and largely stalled the field's development for the next four decades.

Mass violence continued throughout this period and beyond. In the 63 years following World War II, an estimated 92–101 million people were killed in the course of some 313 armed conflicts along cultural, political, social, economic, racial, ethnic, and religious lines.³ These figures do not include countless victims of other atrocities, including rape and other forms of sexual assault, enforced disappearance, and torture.

“Grave Crimes”

This handbook uses the general term “grave crimes” to refer to crimes of genocide, crimes against humanity, war crimes, and other serious forms of crime that merit international concern. Other common terms used to refer to overlapping categories of crimes include “international crimes,” “Rome Statute crimes,” and “crimes under international law.” “Grave crimes” are defined in some national legal codes, but this handbook does not use the term in the sense of any particular domestic definition. Internationally, the term is legally imprecise. This handbook uses “grave crimes” as shorthand when discussing a broad range of mechanisms that deal with international criminal law.

By the early 1990s, the Cold War had ended, allowing diplomatic space for the establishment of ad hoc tribunals in response to grave crimes in the former Yugoslavia and Rwanda. In the 25 years since the creation of the two courts, there has been a proliferation of mechanisms around the world for the investigation, prosecution, and adjudication of grave crimes cases.

In 1998, states agreed to establish a permanent court for war crimes, crimes against humanity, and genocide: the International Criminal Court (ICC), which became operational in 2002. The ICC is a court of last resort, meant to complement national jurisdictions that retain primary responsibility to prosecute crimes under the Rome Statute.⁴ States within this “Rome Statute system” and many of those that still fall outside of it have pursued various approaches to criminal justice for grave crimes.

Grave crimes continue to be committed on an alarming scale around the globe—in such places as Syria, Palestine, Iraq, South Sudan, Burundi, Afghanistan, Ukraine, Mexico, the Philippines, Myanmar, and North Korea. For those demanding criminal accountability in relation to these situations, the experiences of existing accountability mechanisms may hold important lessons.

Some models of criminal accountability have proved more effective than others. Mechanisms in such places as Senegal (in relation to grave crimes committed in Chad), Sierra Leone, Guatemala, and Bosnia have achieved notable successes, while others, in such places as East Timor / Timor-Leste, Kosovo, and Uganda have struggled. In part, results can be explained by operational performance. But in large measure, the *design* of accountability mechanisms for grave crimes has influenced their efficacy. Much can be learned from justice models of the past 25 years, which may inform the design of new institutions.

Purpose of this Report

This handbook seeks to distill lessons from past experiences to help guide those designing new mechanisms of criminal accountability for grave crimes. There is no optimal mechanism model or set of models. In choosing which design elements best suit a new context, policymakers must weigh the strengths and weaknesses of different possibilities; certain design choices may be appropriate in some places but poor choices in others.⁵ The lessons and considerations this handbook offers are meant to guide policymakers through often-thorny calculations about costs, benefits, and even contradictions in design choices. Adding a layer of complexity, stakeholders may have differing views on the issues at stake and the solutions that strike the right balance.

Extensive work has been done by a number of actors in the field of international criminal justice in extracting “lessons learned” and “best practices” from various international justice-related endeavors, including by a number of mechanisms themselves.⁶ However, most of this body of work consists of reports on individual

mechanisms, or places great emphasis on their operations and proceedings. This handbook is distinct in the breadth of its comparative analysis and its focus on the *design* of mechanisms, as opposed to their operation. For example, questions of prosecution strategy (including who should be targeted for investigation, or prosecution, and how) are not considered. To be sure, the line between design and operational lessons is not always clear; mechanism design influences operational decisions. For example, the operational experience of a specific mechanism might have been negative because of a particular design flaw, such as its jurisdiction being too broad, or too narrow, or its independence compromised.

In the past, stakeholders have tended to approach decisions about post-conflict justice “in a reactive, improvised and often inefficient manner.”⁷ With a more comprehensive overview of past experiences, stakeholders should be able to make better choices from a broader palette of options.

The handbook’s intended audience includes: state officials and diplomats, as well as national investigation and prosecution authorities; United Nations (UN) staff and officials; staff and officials of other inter-governmental organizations; and national and international nongovernmental organizations. The handbook examines mechanisms established in response to crimes in Africa, the Americas, Asia, Europe, and the Middle East. Domestic actors may prefer to look to regional examples first before examining other models. The demonstration effect of mechanisms within the same region may be strongest.

Methodology

The identification of lessons from this large pool of diverse experiences relied on an extensive review of documents from international bodies and domestic governments regarding mechanism creation, as well as from primary and secondary legal instruments, reports from the mechanisms themselves, reports from civil society, and news reports. Where details on design were not obtainable through public sources, the Open Society Justice Initiative conducted interviews with officials involved in mechanism operation, and officials involved in the design and operation of mechanisms also offered detail in the course of commenting on drafts of this handbook.

Accountability mechanisms were selected for inclusion in the survey with a view to diversity of model and geography. Even with 33 mechanisms, the list is not exhaustive; it includes Argentina, Colombia, and Serbia, but not Chile, Peru, or

Ukraine. It includes the International Commission against Impunity in Guatemala (CICIG), because it has had success in dealing with serious crimes, even though international crimes fall outside of its mandate. It also includes an expert mission to Mexico, the Interdisciplinary Group of Independent Experts (GIEI), deployed to audit a domestic atrocity investigation, because a mechanism with such a limited, nonprosecution mandate may be the most politically feasible option in some situations. And it includes a UN-created International, Impartial and Independent Mechanism (IIIM) for Syria, which is an innovative model despite its lack of a direct prosecution mandate or structure for adjudication. The list of mechanisms includes some that are not yet fully operational, as well as other design proposals that are stalled or more definitively moribund. These can still help illustrate trends in the design of new models and provide examples for others in their regions.

Falling outside the scope of this study are: commissions of inquiry (which have commonly preceded the establishment of a prosecution mechanism),⁸ truth commissions (which have typically preceded or existed alongside a prosecution mechanism), and forms of transitional justice not of a criminal justice nature.⁹ Additionally, the survey omits review of isolated cases brought on the basis of universal jurisdiction,¹⁰ or immigration-related proceedings that have often been based on alleged commission of international crimes.¹¹ Finally, the permanent ICC is not profiled in the annexes, as information about the court is abundant. Innovations from the Rome Statute and ICC are mentioned at times in this report, as is the ICC's relevance to some domestic prosecution initiatives.¹²

Structure of this Report

The handbook's main body reviews the nine essential elements of mechanism design. This analysis begins with two elements of fundamental nature: the mechanism's purpose and its relationship to the domestic system. Decisions in those areas set important parameters for decisions to be made in the remaining seven areas: jurisdiction, basis of authority, location, structure, the integration of international judges and staff, financing, and oversight. Each section begins with a brief explanation of what is being examined. There follows a summary of experiences to date, describing the spectrum of options that have been pursued. The heart of each section is a list of lessons and considerations that stakeholders should take into account when designing that element. Finally, a list of key questions can serve as a checklist to ensure that important considerations are not overlooked.

The main part of the handbook makes frequent reference to prior mechanism designs, 33 of which are profiled in the annexes. (Where information in the main part of the handbook draws on detailed, sourced information from the annexes, it is not footnoted again, unless sources are directly quoted.) Each mechanism profile follows the same outline. The first three sections summarize the circumstances in which the mechanism was created or proposed: conflict background and political context, existing justice-sector capacity, and existing civil society capacity. These are followed by sections on the mechanism's creation (or events leading to its non-adoption), legal framework and mandate, location, structure and composition (including information on any involvement of international judges or staff), prosecutions, legacy, financing, and oversight and accountability.

Notes

2. Officially named the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), respectively, these tribunals were established to prosecute international crimes committed by Nazi and Japanese political and military officials during World War II. See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011); Y. Tanaka, T. McCormack, and G. Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011).
3. M. Cherif Bassiouni, ed., *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Cambridge: Intersentia, 2010), xiii. These figures are based on data gathered 1945–2008 in Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*.
4. The ICC can only assert jurisdiction where states are “unable” or “unwilling” to prosecute international crimes at home. See *Rome Statute of the International Criminal Court*, UN Doc 2187, UNTS. 90, entered into force July 1, 2002 (Rome Statute), at Preamble, arts 17–20 and 53.
5. As the UN cautioned in 2004, while “the lessons of past transitional justice efforts help inform the design of future ones, the past can only serve as a guideline. Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local debates and decisions.” *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 16.
6. See, for example, *ICTY Manual on Developed Practices*, May 2009, available at: icty.org/sid/10145 (Topics covered include investigations, judgment drafting, management of the Detention Unit, and legal aid policies, as well as a range of other judicial support issues.); *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, January 2014, available at: unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf; *Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial*, February 2015, available at: unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf.

7. Bassiouni, *The Pursuit of International Criminal Justice*, 8.
8. Where a Commission of Inquiry's work led to a mechanism being proposed or created, or affected its mandate, the mechanism profile may include such information.
9. For example, in the United States since the 1980s, a number of cases concerning torture, extrajudicial killing, war crimes, and crimes against humanity have been brought pursuant to the Alien Tort Statute (known as "ATS cases"). As the statute indicates, these claims have been brought pursuant to tort law (the law of civil wrongs) as opposed to criminal law, though the acts giving rise to the litigation have often related to the commission of grave crimes. For further reading on these types of cases, see the website of the Center for Justice and Accountability at: cja.org/article.php?id=435.
10. Universal jurisdiction is "a legal doctrine which permits domestic courts to try and punish perpetrators of some crimes so heinous that they amount to crimes against the whole of humanity, regardless of where they occurred, or the nationality of the victim or perpetrator." See the American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), *Questions and Answers on the ICC and Universal Jurisdiction*. The most well-known cases concerning the use of the universal jurisdiction doctrine include the UK House of Lords in *Ex Parte Pinochet*, as well as a number of Spanish prosecutions concerning Guatemalan, El Salvadoran, and Argentinian officials for international crimes. See ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#Prominent_Cases_Involving_Universal_Jurisdiction. See also Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands*, September 17, 2014.
11. With respect to immigration proceedings, a number of countries including the United States and Canada have specialized agencies concerned with pursuing immigration proceedings against those accused of grave crimes. Generally, however, the focus of these proceedings has not been criminal sanction, but immigration-related action, such as deportation.
12. For example, Kenya, Libya, Côte d'Ivoire, Uganda, Sudan (Darfur), Central African Republic, and the Democratic Republic of Congo are all situation countries before the ICC.

II. THE ELEMENTS OF MECHANISM DESIGN

A. Purpose

A mechanism's *mandate* is articulated in its source documents.³³ The term comprises the purpose behind its establishment as well as the scope of its authority (for more on the latter, see II. C. JURISDICTION).

What is the mechanism intended to achieve? What are its judicial aims (for example, criminal accountability for perpetrators)?¹⁴ These are usually readily quantifiable. But what legacy, or lasting impact, should the mechanism aim to achieve?¹⁵ Legacy, including impact outside the courtroom, is usually difficult to measure, especially in the near term. Should the mechanism attempt to address root causes of the conflict?¹⁶ Does it aim to increase respect for the rule of law? Is it intended to spur justice sector reform and build technical capacity within the domestic justice system? Should it aspire to create an accurate record of disputed events, which may, in turn, foster reconciliation between previously warring factions of society?¹⁷ Does it intend to deter future grave crimes? As former UN Secretary-General Kofi Annan has said, “It is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned.”¹⁸

Experiences to Date

All mechanisms considered for the purposes of this handbook have the express or implied aim of delivering criminal accountability for the commission of grave crimes. For example, the Special Panels for Serious Crimes established in East Timor refer to a Security Council resolution stressing the importance of **bringing perpetrators of serious violations of human rights and international humanitarian law to justice**.¹⁹ The preamble to the 1973 Act establishing the International Crimes Tribunal for Bangladesh (ICTB) states that it is “expedient to provide for the **detention, prosecution and punishment** of persons for genocide, crimes against humanity and war crimes.”²⁰

The mechanisms have greater diversity when it comes to additional objectives. The Security Council Resolution establishing the International Criminal Tribunal for

the former Yugoslavia (ICTY) refers not only to **ending the commission of crimes** and **bringing perpetrators to justice**, but also **contributing to the restoration and maintenance of peace, halting violations, and providing effective redress**. The Security Council Resolution that established the International Criminal Tribunal for Rwanda (ICTR) describes aims of contributing to **national reconciliation** and to the **deterrence** of (future) commission of these crimes. The agreement between the UN and Cambodian government establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) refers to “the **pursuit of justice and national reconciliation, stability, peace and security**.”²¹ Significantly, the Special Court for Sierra Leone’s (SCSL) resolution (1315 of 2000) mentions bringing perpetrators to justice “in accordance with **international standards**.” Further, it includes the establishment of “**a strong and credible court**” as one of its aims, as well as assisting in the “**strengthening of the Sierra Leone judicial system**.” The purpose of the establishment of International Commission against Impunity in Guatemala (CICIG) was to “**support, strengthen and assist [State institutions] responsible for investigating and prosecuting crimes** [within the mandate of CICIG].” The Security Council Resolution establishing the Special Tribunal for Lebanon (STL) mentions assisting Lebanon “in the **search for the truth**” about the Hariri assassination.²² The creation of the Extraordinary African Chambers (EAC) was based on the African Union’s powers to intervene in a member state in respect of “grave circumstances” (war crimes, genocide, and crimes against humanity) and a right of member states to request intervention from the Union in order to **restore peace and security**.²³

In the Democratic Republic of the Congo (DRC), the preamble of the bill proposing to create specialized chambers contains language on the connection between peace and justice. It states that whereas the country used to say “no justice without peace,” it was now taking the position of “**no peace without justice**.”²⁴ One of the draft Kenyan bills to establish a special tribunal listed as a purpose, “to **ensure that violations are effectively redressed and will not recur** in future; and for other purposes connected thereto;”²⁵ and to “**contribute to the process of national reconciliation**.”²⁶ Neither of these mechanisms has ultimately been established. In Uganda, the mission of its International Crimes Division (ICD) is to **fight impunity and promote human rights, peace, and justice**. It is also intended to ensure Uganda has a **strong and independent judiciary** that “delivers and is seen by the people to **deliver justice and contribute to the economic, social and political transformation of society** based on [the] rule of law.”²⁷

Finally, the *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*,²⁸ which contemplates the establishment of a regional criminal mechanism, recognizes a number of purposes, including:

- **peace** (the settling of regional disputes through peaceful means; the promotion of peace, security, and stability);
- the **protection of human and peoples' rights** (mentioned at several junctures);
- the right of the AU to intervene in a Member State in respect of grave circumstances, namely, war crimes, genocide, and crimes against humanity;
- the respect for democratic principles, the **rule of law, and good governance**;
- the respect for the sanctity of human life, and the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression;
- a commitment to the **fight against impunity**;
- the interconnectedness of the promotion of justice and human and peoples' rights on the one hand and **political and socioeconomic integration and development** on the other; and
- the **prevention of serious and massive violations** of human and peoples' rights.

Lessons and Considerations

Main Components

1. **The mechanism's stated purpose should be consistent with other elements of mechanism design.** The mechanism's relationship to the domestic system, jurisdiction, basis of authority, location, means of including international judges and staff (if at all), structure, scale, cost, anticipated period of operation, and oversight should all be reasonably aligned with the stated ambitions. A mechanism claiming ambitions that it is not realistically structured to fulfill will disappoint people who expected those outcomes. For example, as a court with a majority of international judges, and characterized by the judges as not belonging to the domestic justice system, the Special

Court for Sierra Leone was ill suited to deliver on its goal of strengthening Sierra Leone's judicial system. And the ambition of Uganda's ICD to deliver social and political transformation of society based on the rule of law remains elusive in a context where the executive has opposed prosecutorial scrutiny of the country's military.

2. **The mechanism's purposes should be defined, taking into account related justice and peace initiatives.** This is important for coherence: avoiding overlap and gaps that can feed opposition to the mechanism, making the most of limited resources, and harnessing synergies. Where multiple domestic courts have overlapping subject matter jurisdiction, issues of **subsidiarity** (which court can assert primacy over a case or set precedents for a type of case) should be clarified. This has been a challenge in Bosnia, for example. (See II.B. RELATIONSHIP TO THE DOMESTIC SYSTEM.) The mechanism to be designed is often for a place where there are other existing or planned **transitional justice initiatives**, including those for reparation, truth-telling, memorialization, and guarantees of nonrecurrence. In the DRC, for example, the range of transitional justice mechanisms has included multiple domestic prosecution initiatives (extant and proposed), ICC cases, a UN "mapping exercise" of atrocities, and a truth commission. There have also been continuous efforts to disarm, demobilize, and reintegrate illegal combatants. In Colombia, the justice mechanism is bound to an integrated process that also includes demobilization and reintegration of combatants, truth-telling, amnesty, and reparation. The **relationship between prosecution mechanisms and truth commissions** may raise a variety of difficult questions and tensions (as was the case in Sierra Leone). Where both are to exist simultaneously or in close sequence to each other, special care must be taken to ensure coherence.²⁹ In almost every situation (with the usual exception of situations of ongoing conflict, as with the International, Impartial and Independent Mechanism [IIIM] for Syria), there will also be existing or planned **efforts to reform and build the capacity of the justice system**. Drafters should carefully examine how the nascent mechanism's purpose meshes with these. (See also lessons 6 and 8, below.)
3. **Consider including purposes in primary documents in order to create obligations.** By elevating certain purposes to founding issues and including them in main founding instruments, drafters can create core obligations to guide the actions of implementers. For example, the United Nations included in the ICTY and ICTR statutes a mandate to protect victims and witnesses, ensuring that the tribunals were obligated to prioritize such protection. When

empowered through language in the core mandate, implementers can give effect to obligations through subsidiary legislation, rules, policies, structures, and budgets. For budgetary reasons alone, emphasizing purposes in core documents is important. A recurring problem for many mechanisms is that core budgeting has come to refer to the financing of investigation, prosecution, adjudication, and basic administration only, with most other activities left to the vagaries of voluntary, supplemental funding. This adversely affects the ability of the mechanism to deliver on its promises. In the case of the ICTR, although the UN Security Council resolutions establishing the tribunal specifically recognized purposes that included the promotion of reconciliation and the strengthening of domestic courts, these ideas did not appear in the court's founding instrument. This resulted in significant delay in design and implementation of outreach, public information, and legacy programs. While including purposes in founding documents may increase the odds that priorities receive appropriate attention, it does not guarantee it. In Cambodia, the ECCC's mandate includes expansive rights to reparations, but these have been narrowly interpreted by judges unfamiliar with reparations theory and practice, and the court has only meager resources for implementation. (See H. FINANCING).

Core Purposes

4. **Those designing a new investigative and/or prosecution mechanism should be clear about the forms of justice it aims to provide in relation to crimes within its jurisdiction.** The mandate may include criminal accountability, truth, and reparation. That is, mechanisms should investigate and prosecute those against whom there is sufficient admissible evidence and impose punishments that take into account the nature of the crime. Mechanisms can aim to establish facts that lead to their broader acknowledgment in society. (See also recommendation 6, below.) And, as in Colombia, they can aim to provide victims with reparation, including compensation, restitution, rehabilitation, satisfaction, and guarantees of nonrepetition. For the vast majority of mechanisms examined by this handbook, holding perpetrators accountable, providing effective redress for grave crimes—and, in some instances where conflict is ongoing, ending the commission of grave crimes themselves—are their primary goals. Even in the case of Guatemala, where CICIG does not strictly have such powers, its primary goal is to “assist” national authorities in meeting such objectives.

5. **Strongly consider including outreach and public information functions as core components of the mechanism.** Grave crimes proceedings are very likely to touch on sensitive issues that may include conflict narratives, group identities, power politics, and economic interests. In an apparent attempt to undermine cooperation with the SCSL, allies of then-fugitive former Liberian President Charles Taylor actively spread false rumors that the SCSL would prosecute all former combatants in Liberia.³⁰ If not contested vigorously, such attempts to delegitimize an institution through falsehoods about its mandate, independence, funding, or individual cases can lead witnesses and sources to distrust court officials and refrain from cooperation. Effective and early organization of outreach to key stakeholders and the ongoing provision of accurate public information are vital antidotes to rumor and misinformation. Outreach is a dialogue with stakeholders through which a mechanism can share information on its mandate, procedures, and activities, and communities can share their expectations and their views on the process. Beyond countering the threat of misinformation, outreach is essential in order to allow those affected by events to see justice being done, to manage expectations of what the mechanism can and cannot do, to build national ownership over domestic mechanisms, to encourage witnesses and victims to participate in proceedings, to inform the public about legal concepts and build trust in the rule of law, to build public expectations about public access to state institutions in settings where this has not been the experience, and to encourage ordinary justice systems to improve the transparency of less controversial proceedings. However, designers and donors have too often viewed outreach as a “noncore” activity. (See also II.F. STRUCTURE and II.H. FINANCING.)

Legacy Purposes

6. **Strongly consider including an explicit truth-telling purpose to promote impartial and transparent justice.** If contributing to the building of an accurate historical record of crimes committed is an explicit part of a mechanism’s mandate, this provides important guidance to those who will operate it and affects other elements of mechanism design. First, it underscores the imperative of pursuing impartial justice, including following evidence to suspects, regardless of their group affiliations.³¹ Even-handed justice can be key to dispelling old animosities and restoring lost faith in the justice system. Conversely, if a mechanism pursues only one side to a conflict and turns a blind eye to political elites, it may further entrench distrust.³² In the

long term, such outcomes can fuel further tensions and contribute to ongoing political instability. Further, including truth-telling among the mechanism's purposes also encourages transparency, because the more limited act of producing historical records will be of questionable value if such records emerge in sequestered courtrooms and are then sealed away in judicial archives. Truth-telling suggests the need for active engagement with affected populations through outreach and public information.

7. **Be modest and realistic in stating purposes of reconciliation, deterrence, and sustainable peace.** The work of a mechanism may well contribute to these goals, and there may even be good reason to believe that these goals cannot be achieved without the criminal accountability for grave crimes that the mechanism is meant to deliver.³³ However, there are many factors that determine whether communities reconcile, would-be perpetrators refrain from committing atrocities, and sustainable peace can be achieved. Among others, these include political, possibly geopolitical, economic, and environmental factors, as well as the success or failure of myriad initiatives to address each. Accordingly, it is more appropriate to state that an accountability mechanism is intended to “contribute to” these outcomes.³⁴

8. **Consult closely with rule-of-law assistance providers about purposes related to justice-sector reform and development.** Domestic and international officials involved in planning and implementing rule-of-law reforms and capacity building are important constituencies for any new accountability mechanism. Too often, proponents of international criminal justice and those involved in broader rule-of-law reforms have failed to communicate and understand each other's priorities.³⁵ This can result in overlap and conflict. It can also lead to frequently encountered skepticism within the development community that international justice mechanisms are expensive, politically disruptive, isolated, and unsustainable in their rule-of-law benefits, and that they draw resources at the expense of other, more worthy, justice-sector priorities. Such skepticism contributed to a lack of coherent international support for mixed chambers in the DRC, for example. While certain tensions may persist, they can be minimized through communication.³⁶ And there are numerous ways to design and implement international justice mechanisms in ways that maximize coherence with wider justice-sector reform agendas.³⁷ If that is to be an imperative for the model's design, then it should be explicitly stated as a purpose.

Key Questions to Help Determine Purpose

- *What are the main options for defining the judicial purpose, and what effect would each option have on the other elements of design, including jurisdiction, structure, and financing?*
 - *Are there functions—such as witness protection, outreach, public information, and reparation—that in a given context should be incorporated into the mechanism’s stated purpose in order to increase the chances that they are adequately reflected in other elements of design and in implementation?*
 - *Are there other relevant planned or proposed transitional justice initiatives, including other mechanisms dealing with criminal accountability for grave crimes (including the ICC) or truth-telling? If so, how can the mechanism’s purpose define a unique role within a coherent approach?*
 - *What is the strategy for justice-sector reform and development in the country, as articulated by the government, its international partners, and civil society? Can the mechanism’s purpose be refined for maximum congruence with this?*
 - *Do stakeholders want and expect the mechanism to contribute to the truth about contested facts and history?*
 - *In drafting the mechanism’s purpose, have all main domestic and international stakeholders (in government, victim communities, civil society, and the international community) working on issues of justice, peace, and the rule of law been consulted?*
-

B. Relationship to Domestic System

What is the relationship of the mechanism to the domestic judicial system? Is it an integrated part of the system, does it operate through parallel specialized institutions, or is it wholly outside of the system? Designers of a mechanism may begin with a preference for the nature of the relationship, or this may be derived from a series of discrete design decisions. In the end, to reflect the needs of a given context, a mechanism may be very integrated in some ways and remote in others.

There are many different design variables that determine or flow from a mechanism’s relationship to the domestic system. Some of these variables are examined in dedicated sections of this handbook, including BASIS OF AUTHORITY,

LOCATION, elements of STRUCTURE, whether international personnel are involved (discussed in INTEGRATION OF INTERNATIONAL JUDGES AND STAFF), FINANCING, and OVERSIGHT.

A number of other design variables concern legal features. Will the mechanism use the same legal system (civil law, common law, sharia, traditional or customary law, or some mixture) already present in the country? Among other things, decisions on criminal procedure may determine the extent to which victims can participate in proceedings, and the extent to which they are eligible for reparations. Will domestic amnesties, where present, be recognized? Will the mechanism use existing official languages, or also operate in one or more foreign languages or local dialects?

Overlaid across this set of questions is another relating to international standards in criminal procedure. For example, will the mechanism ensure fair trial rights, even if the existing domestic system has shortcomings in this area? Will it adhere to international standards with regard to pretrial detention and provisional release? How will it handle acquitted persons? Will convicted persons face the death penalty?

Experiences to Date

The continuum of mechanisms has ranged from wholly international tribunals (ad hoc tribunals, established by the UN Security Council, exercising peace and security powers under Chapter VII of the UN Charter) to fully domestic mechanisms. But even those mechanisms considered to be fully domestic, such as the International Crimes Tribunal for Bangladesh (ICTB), or domestic prosecutions in Argentinian and Colombian courts, have at least some “international” dimensions, given their application (via domestic law) of a body of international criminal law.

Where mechanisms have fallen along the international-domestic spectrum has generally depended on a number of factors. The following table illustrates broad tendencies in the relationship of mechanisms to the domestic justice system. There are, however, important exceptions and caveats to these (addressed in the Lessons and Considerations section that follows this one).

In addition to these factors, since the establishment of the ICTY and ICTR in the early 1990s and the drive for a permanent ICC during that decade, there has been a trend away from “heavier,” more intrusive and international mechanism models. In recent years, states have exhibited a preference for “lighter,” more domestic models where possible.

FACTOR	MORE DOMESTIC	MORE INTERNATIONAL
Mechanism purpose	Intended to help advance general rule of law development and/or promote other transitional justice goals, in addition to delivering accountability through cases.	Focused more narrowly on delivering criminal accountability through the investigation, prosecution, and adjudication of cases.
Political will	Will or acquiescence (via domestic and/or international pressure) to adopt legislation and reform or create requisite institutions.	External imposition deemed necessary due to lack of domestic political will.
Domestic technical capacity	Higher investigative, prosecutory, and judicial capacity.	Lower investigative, prosecutory, and judicial capacity.
Security situation	Secure environment for participants in the proceedings.	Insecure environment for participants in the proceedings.
Infrastructure	Good or adequate.	Poor or non-existent.
State of legal framework	International criminal law and procedural law largely meet international standards (or planned passage of relevant reforms).	No international criminal law provisions in domestic code; procedural law that falls short of international standards.
Openness to foreign involvement (in general, or with regard to particular foreign actors)	Countries that experienced colonization and/or hegemony in living memory.	Countries seeking international integration (in general, or with particular alliances).
Availability of international funding	Low likelihood of substantial international funding	Higher likelihood of substantial international funding.
Other significant international engagement, existing or planned	Little or no significant intrusive international involvement.	Presence of international administration or robust peacekeeping.

Wholly international tribunals exist as independent institutions, outside of the domestic justice system. The ICTY and the ICTR have carried out their own, independent mandates entrusted to them by the global community, via the UN Security Council. Yet these ad hoc models encountered numerous challenges arising from their physical and legal remoteness from affected societies and states. Distance presented challenges in such areas as access to evidence and witnesses and making proceedings accessible to affected populations. Ultimately, remote tribunals (including the ICC) struggle for relevance when it comes to issues of domestic rule-of-law reform, truth-telling, and reconciliation. Remoteness has also been a factor in the slow pace of proceedings and a key driver of cost.

To an extent, the ad hoc tribunals reached past these limitations through liaison to other justice mechanisms operating within the countries concerned (Rwanda and the countries of the former Yugoslavia—Bosnia and Herzegovina, Croatia, Serbia, and Kosovo). The potential referral of cases to countries of the former Yugoslavia and Rwanda, and the ongoing monitoring of those cases by court-appointed observers as the cases have progressed, has been an important dimension to the relationship between the countries and the tribunals. The ICTY’s completion strategy (of which Rule 11*bis* case referrals were a key component) was the catalyst for the international community’s chief administrator in Bosnia (the High Representative) to create the State Court, the Prosecutor’s Office, and its special divisions for dealing with international and other forms of serious crime. A series of failed attempts by the ICTR prosecutor to refer cases to Rwanda led to a number of amendments being made to Rwandan domestic legislation so that referrals could ultimately be granted.³⁸ Although the ad hoc tribunals exist wholly independently from the countries with which their proceedings are concerned, there has been a notable legal and political dialogue between them.

Between the two poles of wholly international and fully domestic mechanisms, there has been a vast array of hybrid, internationalized, and internationally-supported mechanisms with differing defining features.³⁹ These range from treaty-based institutions (such as the SCSL or the ICC) to domestic courts with international assistance (such as the ECCC) and include various combinations and degrees of foreign involvement. The Extraordinary African Chambers (EAC) are established within the Senegalese court system, pursuant to an agreement between the African Union (represented by the African Union Commission) and the government of the Republic of Senegal. The statute establishing the Iraq High Tribunal explicitly described it as “an independent entity and not associated with any Iraqi government departments.”⁴⁰ In Bangladesh, the International Crimes Tribunal is a wholly domestic court (a separate court, with specific international criminal jurisdiction) established within the domestic court system. In the DRC, there have been approaches embedded in the domestic system (military and, more recently, civilian courts, including mobile courts) and proposed mixed chambers that would establish specialized institutions and involve international judges and officials.

The Special War Crimes Chamber (SWCC) in Serbia is a domestic chamber established pursuant to Serbian domestic law. In Croatia, although four specialized war crimes chambers were established in county courts, most trials are prosecuted before regular chambers in those courts. Prosecutors in 20 county court jurisdictions have territorial jurisdiction over war crimes cases and are supervised in their work by the chief state prosecutor.⁴¹ Although beyond the scope of this handbook,

specialized war crimes units have been established in a number of countries for the purposes of investigating and prosecuting international crimes pursuant to universal jurisdiction.⁴²

Incorporation of International Standards in Criminal Procedure

Mechanisms have incorporated international standards related to criminal procedure to varying degrees. (For discussion of international standards in substantive law, see C.1. SUBJECT MATTER JURISDICTION.)

The International Covenant on Civil and Political Rights (ICCPR) sets out bedrock standards for due process in criminal proceedings. Article 14 of the ICCPR outlines such concepts as:⁴³ the right to equality before the law; the right to a fair and public hearing by a competent, independent, and impartial tribunal; the right to presumption of innocence;⁴⁴ and the right to a number of minimum fair trial guarantees.⁴⁵ It also refers to the right to appeal,⁴⁶ to compensation following wrongful conviction, and to protection against double jeopardy.⁴⁷ Article 15 of the ICCPR provides the right not to be punished through retroactive application of national or international law, but notes that individuals can be prosecuted and punished for an act or omission that was illegal under customary international law at the time of commission.⁴⁸ Under international law, the requirement of competence, independence, and impartiality of a tribunal in the sense of ICCPR Article 14 is an absolute right that is not subject to any exception.⁴⁹

Other international standards relevant to the design of a new mechanism include the UN Basic Principles on the Independence of the Judiciary,⁵⁰ the Bangalore Principles of Judicial Conduct, the UN Standard Minimum Rules for the Treatment of Prisoners,⁵¹ and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁵²

Generally, mechanisms dealing with grave crimes that are most remote from domestic systems, including the ICTY, ICTR, and SCSL, have anchored international standards in founding documents. They have done so through explicit reference to the ICCPR and other international covenants, or such regional instruments as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights. For mechanisms more integrated with domestic justice systems, the extent of compliance with international standards in criminal procedure has generally

reflected the given country's general adoption of those standards. With regard to the independence of the judiciary, degrees of compliance with international standards are determined by constitutional and statutory laws that set out processes for the appointment and removal of judges and the independence of the body in charge of making judicial selections/appointments, including how its members are chosen.

As also provided by the Vienna Convention on the Law of Treaties,⁵³ states parties to the ICCPR must respect the guarantees in Article 14 of the covenant regardless of their legal traditions and their domestic law.⁵⁴ Some states parties to the ICCPR have expressed reservations on certain aspects of Article 14. Among these are countries that have created mechanisms to deal with grave crimes. For example, Bangladesh has reserved the ability to try accused persons in absentia under certain circumstances.⁵⁵ And in both Bangladesh and Iraq, mechanisms have carried out the death penalty in contravention of international standards.⁵⁶

With varying degrees of success, the introduction of mechanisms to deal with grave crimes has led countries to accept new international standards. For example, Rwanda abolished the death penalty in order to try grave crimes cases transferred from the ICTR. By contrast, Cambodia resisted pressure to adopt international standards during the negotiations that led to the ECCC's creation.⁵⁷

Lessons and Considerations

Security

1. **Where conflict is ongoing or there is reason to believe that significant security threats to participants in judicial proceedings persist, a mechanism with more external characteristics may be most appropriate.** Most notably, this may relate to location, as with the ICTY (which began its work in the midst of ongoing war in the former Yugoslavia), the IIIM for Syria (established at a time when there is no end in sight to the conflict), and the Kosovo Specialist Chambers (established in The Hague due to witness protection concerns in Kosovo). (For more detailed considerations, see E. LOCATION.) It may also be possible to proceed with an in-country mechanism that relies on external actors to provide security. Several mechanisms operating in conflict or fragile post-conflict settings have relied on UN peacekeeping operations. These include the Special Criminal Court for the Central African Republic (SCC), the Special Court for Sierra Leone, and domestic mobile courts hearing international crimes cases in remote locations

of the eastern Democratic Republic of Congo. Mechanisms in insecure environments may also seek to externalize witness protection through agreements with foreign witness protection agencies.

Legitimacy

2. **Usually, a mechanism more integrated with the domestic system can be expected to enjoy greater domestic legitimacy than would a mechanism external to it.** A mechanism that is external in location includes international officials or introduces foreign legal concepts may naturally arouse doubt and suspicion within the affected population. Societies that experienced traumatic foreign control or influence, including through colonization (e.g., most of sub-Saharan Africa), invasion (e.g., Iraq), or hegemony (e.g., the Cold War experience in most of the developing world) are likely to have heightened sensitivity to mechanisms that concede elements of national sovereignty.
3. **There may be greater popular acceptance for external elements where the mechanism exposes crimes associated with the former colonial power or hegemon.** Thus in Guatemala, victims of grave crimes perpetrated by U.S.-aligned military governments during the Cold War have embraced CICIG's role in making prosecutions possible (perhaps despite the fact that CICIG has enjoyed American government support). In Ukraine, many officials, civil society organizations, and victims have welcomed international assistance in grave crimes cases; some even seek the temporary inclusion of international officials in the country's justice institutions. The relative openness to Western international involvement is tied to the role of former hegemon and current adversary Russia in the perpetration of alleged crimes.
4. **Where the domestic justice system is widely discredited or viewed as partial, a mechanism external to it may enjoy greater popular legitimacy.** Populations that broadly distrust their justice systems are more likely to want mechanisms external to those systems. In Mexico, popular distrust means that only one in ten crimes are reported to authorities.⁵⁸ There, the involvement of the Interdisciplinary Group of Independent Experts (GIEI), deployed by the Inter-American Commission of Human Rights to audit the investigation of high-profile killings and enforced disappearances, was broadly accepted; the GIEI notably secured the trust of victims' families who rejected the legitimacy of the investigation by Mexican authorities. Similarly, many Kenyans distrustful of national police and prosecutors, including top members

of the political opposition, advocated for creation of the external Kenya Special Tribunal; and a large majority of the population welcomed the involvement of the entirely international ICC despite government efforts to portray it as a neocolonial institution.

Political Will

5. **Where domestic authorities have a genuine desire to hold perpetrators to account for grave crimes without regard for their faction or rank, generally, better conditions are created for a mechanism that is integrated with the domestic justice system rather than external to it. Greater political will can also lead to greater openness to international involvement where this may be needed to add technical capacity.**

Prosecutions before the domestic courts of post-junta Argentina provide a good example of the former. The Special Court for Sierra Leone is a good example of the latter.

6. **Governments opposed to or wishing to control grave crimes proceedings are reluctant to accept mechanisms that are sufficiently external and independent.** Government opposition has ultimately led to the defeat of proposals for mechanisms in locations including Liberia, Kenya, Burundi, and Darfur, Sudan. In negotiations with the United Nations to create the ECCC, Cambodia's government insisted on safeguards that would allow it to place limits on the proceedings. The UN conceded to a model of co-administration that has led to obstruction, operational problems, and tremendous inefficiencies. Creating a mechanism despite government obstruction requires extensive international engagement (e.g., ICTY) and/or the persistent efforts of organized, capable civil society organizations (e.g., CICIG) to change the political dynamics.

Jurisdiction

7. **In planning a new mechanism, it is important to ensure clarity in the relationship between its jurisdiction and existing courts with overlapping jurisdiction.** This relationship may concern international courts. In Rwanda and the former Yugoslavia, international tribunals had clear primacy of jurisdiction over national courts with overlapping jurisdiction. Within the Rome Statute system, the primary obligation to investigate and prosecute international crimes lies with national authorities, and in accordance with the

principle of complementarity, the ICC may only step in if states are unable or unwilling to do so. But questions of subsidiarity may relate to other domestic courts, as in Croatia and Bosnia. The Bosnia and Herzegovina War Crimes Chamber (BiH WCC) exists alongside local courts trying grave crimes cases, but the latter are not required to follow War Crimes Chamber jurisprudence. There has also been a lack of clarity over division of cases between the courts, making it difficult to develop a national strategy. Different entities in Bosnia have also interpreted applicable law differently.

8. **External investigative mechanisms that operate alongside national institutions can be effective where political circumstances are conducive to collaboration.** In Guatemala, CICIG has conducted independent and joint investigations with a willing Attorney General's Office, and forged a productive, cooperative relationship with its prosecutors. By contrast, in Mexico, the GIEI conducted a parallel investigation into a notorious atrocity, but encountered obstruction by the Federal Prosecutor's Office. The GIEI's members were illegally surveilled by Mexican government institutions, and their findings, including the identification of leads not followed by national investigators, have remained largely ignored.
9. **Nevertheless, parallel investigations in the absence of national political will can still deliver benefits.** A prerequisite for providing value despite a lack of effective collaboration with national authorities may be strong support from domestic civil society and the international community. This was the case in Mexico, where the GIEI mechanism developed extensive new information on the disappearance of 43 students. The students' grieving family members found value in this. And by revealing deep flaws in the federal government's investigation of the case, as well as possibly greater government involvement in the perpetration of the crimes, the GIEI also contributed to a civil-society-driven national debate on the causes of impunity and the need for justice reform.

Capacity and Infrastructure

10. **The less developed the country's existing justice-sector capacity is, the more likely it is that a mechanism will need international characteristics to succeed.** At issue are the capacities of officials across the judicial chain, including criminal investigators, prosecutors, judges, defense counsel, court administrators, witness protection officers, and prison officials, as well as

physical infrastructure, including offices, courthouses, and detention facilities. Where a country's basic capacities have suffered from conflict and/or neglect, as in Timor-Leste, Kosovo, or the Central African Republic, it is more difficult for a domestic criminal justice system to address ordinary crimes, much less complicated international crimes, without significant foreign involvement. Where baseline capacities are stronger, as in Senegal or Argentina, the need for external participation or support is usually more specific to expertise in international criminal law or other special needs associated with complex grave crimes cases, such as forensics, witness protection, and outreach. Countries with higher baseline capacities may need external elements on a temporary basis (as with domestic proceedings in Bosnia), whereas international support and involvement are likely to be longer-term needs in countries with less developed justice systems (as in the DRC).

Strengthening the Rule of Law

11. **If part of the mechanism's purpose is to strengthen the rule of law in the country concerned, then seeking maximum integration of the mechanism with the domestic justice system is *usually* preferable.** The placement of a mechanism within the domestic system has the greatest potential for benefits to spill over into the justice sector as a whole, and the greatest potential that the mechanism itself will benefit from existing justice-sector development efforts. Mechanisms that are remote in physical location (e.g. the Special Tribunal for Lebanon), in applicable legal framework (e.g., the Special Court for Sierra Leone), or in participation of national staff (e.g., the Kosovo Specialist Chambers and Specialist Prosecutor's Office), generally have reduced chances of leaving legacies in one or more of the areas of domestic jurisprudence, domestic technical capacities, and physical infrastructure. The more remote a mechanism's key characteristics, the less it can usually serve to enhance the capability and credibility of the domestic justice system.
12. **However, under certain circumstances, mechanisms not integrated with the domestic system can still have substantial impact on justice-sector reform.** This has occurred where external mechanisms have had legal or political leverage over domestic authorities, and where they have invested in legacy programs, capacity building, and outreach. In Guatemala, the CICIG mechanism that exists in parallel with domestic authorities has played a major role in the successful promotion of rule-of-law reform, the advancement of reformist justice-sector officials, the introduction of new investigative

capacities, and the nurturing of a skilled group of prosecutors and investigators within the Attorney General's Office who have asserted their autonomy from political elites. By successfully developing criminal cases against powerful individuals and successfully galvanizing political pressure, as well as through mentorship and collaboration with Guatemala's Attorney General's Office, CICIG has "helped Guatemalans reach a juncture where major political reform has become a real possibility for the first time since the signing of the Peace Accords 20 years ago."⁵⁹ The ICTY and the ICTR influenced the domestic systems with which they were concerned through the conditioned transfer of cases involving lower-level suspects to those jurisdictions; the conditional transfer of cases proper to those jurisdictions, via Rule 11*bis* proceedings; and various training initiatives. In the case of the ICTY, the completion strategy had the effect of shifting funds to national-level proceedings, where they contributed to general justice-sector development. While neither the SCSL nor the ECCC has transferred any cases to their respective domestic jurisdictions, they have each developed other legacy-related initiatives.⁶⁰ The SCSL viewed outreach and legacy as core elements of its work from a very early stage, with corresponding discernible benefits.⁶¹

13. **Under the wrong conditions, mechanisms more integrated with domestic systems risk damaging that system's legitimacy.** A mechanism proximate to a politicized judiciary, as in Cambodia, can reinforce the notion that strong executive control over the reach of criminal accountability efforts is normal. Similarly, even where there is greater judicial independence, as in Uganda and Kenya, mechanisms may remain at the mercy of police and prosecution services that refuse to investigate or prosecute any cases or advance cases only in relation to members of anti-state groups or the political opposition. Prosecutions that clearly align with the interests on one side of a political, ethnic, or religious divide (e.g., in Bangladesh, Iraq, and Côte d'Ivoire) taint the entire endeavor and may ultimately be destabilizing.
14. **Mechanisms integrated with the domestic system open greater opportunities for synergy between international support for the mechanism and other existing or planned rule-of-law development initiatives.** A mechanism focused on grave crimes will have some needs specific to the nature, gravity, complexity, and controversy usually inherent to this type of case. Special needs arise in substantive international criminal law, and usually in areas such as provision of psychosocial assistance to victims and witnesses, enhanced witness protection, and outreach. The rule-of-law support

community has often expressed concern that donor support for high-profile specialized grave crimes mechanisms can detract from support for sustainable justice-sector reform and capacity building. However, there is broad overlap between the needs of a mechanism dealing with grave crimes and a domestic justice system when it comes to requisite technical skills and infrastructure. It follows that the more integrated a mechanism is with the domestic system, the more opportunities there will be for synergy in such areas as legal reform; training for police, prosecutors, defense attorneys, and judges; courtroom and detention facility refurbishment; or the design of new institutions, such as witness protection agencies.⁶² However, this prospect does not guarantee mutual support. In the DRC, for example, some donors still worried that proposed mixed chambers for war crimes within the domestic system would detract from other rule-of-law priorities, and this contributed to the proposal's collapse.

International Standards

15. **If the intent is to create a mechanism that comports with international standards and best practices, then the extent to which the existing legal system already meets these, or the state is willing to adopt them, sets a key parameter for the mechanism's potential integration with the domestic system.** Relevant standards include those in the areas of substantive international criminal law, fair trial rights, reparations, victim participation, witness protection, and detention.

16. **Where domestic amnesties and other legal provisions do not meet international standards or are abused to shield perpetrators of grave crime, there is greater reason for a mechanism that is more external in nature.** In recent decades, case law has increasingly constrained the granting of amnesty and immunities for crimes under international law and serious human rights violations.⁶³ There is a growing consensus that amnesties for crimes under international law are prohibited, as they deny the right of victims to justice, truth, and reparation; the prohibition is clearest for genocide, crimes against humanity, and war crimes.⁶⁴ Apart from amnesty laws, states sometimes grant statutory immunity to heads of state and other high officials or have statutes of limitations for grave crimes that do not comport with international standards. In some countries with weak judiciaries, elements including pardons, the prohibition on double jeopardy, plea bargaining, the filing of interlocutory appeals, requests for judges' recusal, and other common

criminal procedures are sometimes inappropriately applied to shield the perpetrators of grave crimes. Such domestic obstacles might persist until there is a change in the political situation that removes them, as happened with amnesty laws for grave crimes in Argentina. Or an externalized mechanism can make international law directly applicable in ways that circumvent inappropriate domestic legal obstacles. For example, it has been argued that the SCSL “could not exist as part of the domestic legal system without raising complex questions relating to a prior amnesty law and the sovereign immunity of Charles Taylor.”⁶⁵

17. **The introduction of external legal concepts may bring greater conformity with international standards, but can create complications that must be anticipated and addressed.** To be effective, new legal concepts require implementation by officials familiar with them. This could mean **including foreign legal experts** in direct implementation and mentoring, as in East Timor, Kosovo, or Bosnia, and meeting the challenges that this entails. (See G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.) Or where internationals are not directly involved in implementation, it could mean undertaking extensive **training** in other ways, as has been done across a large range of mechanisms. **Changes to legal codes** in order to meet international standards (or for other reasons) create inherent challenges. For example, in Bosnia, the creation of the War Crimes Chamber was accompanied by the introduction of adversarial concepts such as judicial notice and plea bargaining that were unfamiliar to judges, prosecutors, and defense counsel.⁶⁶ In Iraq, elements of the IHT statute inserted by U.S. officials were alien to Iraqi law and caused confusion.⁶⁷ Mechanisms in Cambodia and East Timor encountered similar difficulties. The introduction of new substantive law through statute or application of customary international law may raise significant questions about the principle of legality, as it has in Uganda. (See also C.1. SUBJECT MATTER JURISDICTION.) New standards may **challenge amnesties**, as has happened in Argentina and Sierra Leone. And the application of international standards in a specialized mechanism’s detention facility can create a situation in which those accused of the gravest of crimes enjoy much better conditions of detention than those accused of lesser crimes, who are locked up in national prisons.

18. **The operation of a more integrated mechanism holds the potential to create jurisprudence that is helpful in propagating international standards in the judiciary’s future interpretation of substantive and**

procedural law, especially in common law systems. The logic of this remains largely theoretical. In Uganda, for example, there has been so little activity by the International Crimes Division that it has not developed much jurisprudence of any kind. In Bosnia, which adopted many common law elements in its criminal procedure at the same time its War Crimes Chamber was created, there is still no system of precedent; the Chamber's jurisprudence is not binding on lower courts dealing with grave crimes cases throughout the country.

19. **A thorough review of the existing legal framework and system should be conducted in order to weigh the advantages and risks of incorporating domestic elements that do not (yet) meet international standards.** In Sierra Leone, the creation of the SCSL outside of the national justice system, along with the prosecutor's decision not to apply domestic law (although possible under the statute), may have missed opportunities to bolster the application of international legal standards in the domestic system. However, the court arguably had an impact on improving standards in other areas. For example, the transfer of the SCSL detention facility to national authorities, and the experience of many Sierra Leonean guards at the SCSL may well have raised the standards of detention for some incarcerated Sierra Leoneans. The Iraq High Tribunal had inadequate protections for defense rights and foresaw the death penalty, in contravention of international standards. This resulted in rushed proceedings and the execution of Saddam Hussein and others following the hearing of only partial evidence. Victims interested in justice for other crimes and the truth-telling component of the proceedings were disappointed. In any situation, an assessment must be conducted before it is determined what kind of relationship between the mechanism and the domestic system best suits the circumstances.
20. **A mechanism that flouts international standards will have fewer potential sources of international cooperation and support.** For example, the applicability of the death penalty and deficits in fair trial rights at the Iraq High Tribunal and International Crimes Tribunal of Bangladesh alienated potential partners and donors.⁶⁸
21. **If the mechanism's purpose includes reparation to victims, in accordance with emerging standards in international law, there may be need for a more externalized mechanism if the domestic framework does not include or cannot be amended to include provision of reparations as**

part of the criminal process. However, the existence of formal norms and procedures for reparation are no guarantee that they will be applied. (See II.F. STRUCTURE, and II.H. FINANCING.)

Language

22. **More integrated mechanisms are likely to face fewer difficulties in making trials comprehensible to affected populations than are external mechanisms involving international officials who speak foreign languages.** Nevertheless, if the existing justice system does not already have a facility to interpret proceedings into minority languages of the country, special provision may need to be made to make trials accessible to minority communities affected by the underlying events. Uganda's ICD, for example, has had to work with the Acholi language of northern Uganda, where it has also held hearings.
23. **Having too many official languages can cause delay and raise costs.** Following the experience of the ad hoc tribunals, many court officials, administrators, and diplomats have concluded that it was a mistake for the ICTY and ICTR each to have three official languages, because each foreign language added (French and English) meant an immense cost for interpretation and translation, and led to delays. At the ECCC, many have regarded the need to interpret and translate everything into English *and* French as a vast waste of resources and a cause of significant delay. In East Timor, the use of four official languages (Portuguese, Tetum, Bahasa Indonesian, and English) delayed proceedings before the Special Panels.
24. **External sources of law can cause difficulties if not precisely translated.** In Iraq, translation errors in the criminal procedure code created confusion over the standard of proof that would be applicable at the IHT.
25. **In areas where a major world language is not in official use, a mechanism that relies on external sources of law may struggle to find relevant international jurisprudence in the local language(s).** In Bosnia, this necessitated a major effort to translate jurisprudence into Serbo-Croatian. But even where there has been investment in the translation of jurisprudence, judgments can be too long or complex to be of much use in the national context. Investing in local-language digests and annotations of the mechanism's decisions, as the UN's Office of the High Commissioner for Human Rights (OHCHR) has done to an extent regarding the ECCC

in Cambodia, can increase their accessibility to domestic judges and thus increase the lasting effect on national judicial practice.

Acquittals and Sentencing

26. **External mechanisms may face additional challenges in dealing with persons acquitted and those sentenced.** Purely domestic mechanisms located in the country often face challenges in providing secure and humane detention and prison facilities for sentenced persons, and they often lack means to protect and support acquitted persons. Additionally, if a mechanism is located outside the domestic system of suspected perpetrators' country of citizenship, the mandate must contemplate what will happen with those who are sentenced and acquitted. External courts, including the ICTR, ICTY, and SCSL, must negotiate agreements with states on the enforcement of sentences if the affected country is unable to securely detain convicted persons in accordance with international standards. It can be more difficult to find states willing to accept acquitted persons. Defendants acquitted at the ICTR, for example, were unable to return to Rwanda and found states unwilling to grant them visas due to lingering perceptions of their guilt, despite court rulings to the contrary. Many have had to continue living in UN "safe houses" in Arusha, Tanzania, while the UN and its Mechanism for International Criminal Tribunals (MICT) have struggled to resolve a problem that should have been anticipated at the tribunal's inception.⁶⁹

Transition Strategies

27. **The design of external mechanisms must contemplate transitional issues.** External mechanisms are extraordinary and temporary. Upon their completion, some apparatus must assume their residual functions, including the pursuit of remaining fugitives and their potential trials, the adjudication of new legal issues concerning conditions of detention, and witness protection and support. To deal with such issues following the expiration of the ICTY and ICTR mandates, the UN Security Council created the MICT in 2010. Similarly, the Residual Special Court for Sierra Leone was created as a bare-bones but expandable entity to deal with the SCSL's residual functions. In Bosnia, external components of the War Crimes Chamber and Special Division for War Crimes in the Prosecutor's Office were phased out, leaving in place purely domestic mechanisms. In such places as Argentina, there is no transition because the proceedings occur within a domestic system that will continue to exist.

Key Questions to Help Determine the Relationship to the Domestic System

- *Does the security situation in the country allow for a domestically located and operated mechanism, or does insecurity suggest that an external location and/or inclusion of international officials may be necessary for it to function?*
- *Is there popular domestic sensitivity about the involvement of foreigners in internal affairs (as opposed to more limited government sensitivity, which could be based on self-interest)? If so, is that sensitivity general in nature or particularly acute with regard to certain countries (such as former colonial powers) or regions?*
- *Does the domestic justice sector enjoy popular credibility? If not, is there reason to believe that the incorporation of external elements, including foreign sources of law or the involvement of international officials, would increase the mechanism's legitimacy?*
- *Has the executive respected the independence of domestic judges and the autonomy of prosecutors? If not, are there any promising measures being taken to strengthen judicial independence?*
- *What is the capacity of officials across the justice chain to conduct proceedings in accordance with law and to do so fairly and efficiently? Are there areas of need specific to proceedings for the grave crimes in question?⁷⁰*
- *Are there existing plans for general justice-sector development that could obviate the need for some external elements of mechanism design?*
- *Does the country's substantive law meet international standards, especially with regard to crime definitions under international criminal law? If not, are there reasonable prospects for legal reform in the near future?*
- *Does the country's criminal procedure comport with international standards and best practices, including in the areas of fair trial rights, prohibition of capital punishment, reparation, victim participation, witness protection, and conditions of detention?*
- *Are there domestic amnesties, immunity laws, statutes of limitation, or other legal provisions in place that might obstruct the prosecution of suspected perpetrators of grave crimes if the mechanism operates under domestic law?*
- *If the introduction of foreign legal concepts into the domestic system is being contemplated, are there resources available to ensure effective implementation through mentoring, training, translation of resource documents, or other means?*

- *Would embedding the mechanism in the domestic system increase the chances that its functioning could strengthen standards in the regular justice system? In the country in question, could an integrated mechanism create positive judicial precedent in relation to the interpretation of substantive and/or procedural law?*
 - *What is the risk that integrating a mechanism in a politicized domestic justice system will result in proceedings that lack fairness and credibility? What types, intensity, and duration of external involvement would be needed to mitigate identified risks?*
 - *Which working languages are essential for the mechanism to function, and what would be the implications of adding one or more foreign languages to facilitate possible international participation?*
 - *Is relevant international jurisprudence already available in the possible working languages of the mechanism? If not, what are the implications of translation needs, in terms of cost and time?*
 - *If an external mechanism is contemplated, where will convicted persons serve their sentences, and what will happen to those who are acquitted and to convicted persons who have completed their sentences? Are international cooperation agreements necessary?*
 - *If an external mechanism is contemplated, what institution(s) will handle residual issues, including the prosecution of fugitives, legal challenges to the conditions of detention, witness protection, and the implementation of awarded reparations?*
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C. Jurisdiction

The jurisdiction component of a mechanism's mandate encompasses subject matter, personal, temporal, and geographic (or territorial) jurisdiction. In other words, who will be subject to the court's authority and pursuant to which forms of criminal liability, for which crimes, occurring when, and where? This section looks at each of these components in turn.

1. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the list of crimes a mechanism is authorized to investigate, prosecute, and adjudicate. This forms the core of a mechanism's mandate.

Experiences to Date

Most mechanisms considered for the purposes of this handbook have focused on three core international crimes: genocide, crimes against humanity, and war crimes. These core three, however, are in the process of making way for a fourth: the crime of aggression.⁷¹ In the Democratic Republic of Congo, for example, a proposal for the establishment of specialized chambers reflected the currency of these developments.⁷² Meanwhile, in Bangladesh, despite its founding Act, which dates back to 1973, the International Crimes Tribunal for Bangladesh (ICTB) may have been ahead of its time in subject matter jurisdiction: it has jurisdiction over the core three, as well as “crimes against peace” (including waging a war of aggression).⁷³ Mechanisms considered by this handbook that have been proposed but not implemented feature the core three. For example, with regard to Burundi, the Arusha Agreement of 2000 contemplates the establishment of an “international criminal tribunal to try and punish those responsible [for] acts of genocide, war crimes and crimes against humanity.”⁷⁴ Similarly, the August 2015 peace agreement for South Sudan⁷⁵ includes the proposed establishment of a hybrid court “to investigate and prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law,” in particular the core three and “other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence.”⁷⁶ The proposed Special Court for Darfur would have jurisdiction over “gross violations of human rights and serious violations of international humanitarian law.”⁷⁷

Some mechanisms have jurisdiction over crimes other than the core three, and this has legal consequences. The inclusion of additional crimes allows the prosecution of offenses without needing to prove additional contextual elements that would qualify them as “core three crimes” (such things as scale, policy, or the existence of a military conflict). However, while statutes of limitation, amnesties, and immunities should not apply for international crimes, including at least war crimes, crimes against humanity, and genocide, such limitations on prosecution may apply for ordinary crimes included in the mandate.

The Statute of the Extraordinary African Chambers specifically names the crime of torture in addition to the core three. Other mechanisms, such as the SCSL and ECCC, have had mandates to prosecute certain domestic crimes in addition to core international crimes. Others have had mandates to investigate and prosecute crimes that straddle the domestic/transnational crime divide, such as terrorism. The Special Tribunal for Lebanon only has jurisdiction over offences under the

Lebanese Criminal Code, most notably intentional homicide and acts of terrorism. The International Crimes Division of the Ugandan High Court has jurisdiction to deal with those who have committed “serious crimes,” which include the core three, as well as crimes of terrorism, human trafficking, piracy, and “other international crimes.”⁷⁸ Some of these ideas are reflected also in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which would give the court international criminal jurisdiction.⁷⁹ Discussions and proposals for a Special Tribunal for Kenya contemplated subject matter jurisdiction over “genocide, gross violations of human rights, crimes against humanity and such other crimes as may be specified in the Statute.”⁸⁰

The Iraqi High Tribunal (IHT) had jurisdiction over the core three, as well as “violations of Iraqi laws.” Broadly, this provision encompassed “interference in the affairs of the judiciary or attempting to influence its functioning; the wastage and squandering of national resources; the abuse of position and the pursuit of policies that have almost led to the threat of war.”⁸¹ In Kosovo, international judges recruited by the UN could sit not only on grave crimes cases but also whenever “necessary to ensure the independence of the judiciary or the proper administration of justice.”⁸² One of the most ambitious articulations of subject matter jurisdiction among the mechanisms reviewed for this handbook is that in the draft statute for the (proposed) Extraordinary Criminal Court for Liberia (ECCL). The document proposed several pages of international, transnational, and domestic crimes, including economic crimes. It aimed to give the ECCL both criminal and administrative jurisdiction. On the administrative side, it sought to establish jurisdiction over “final administrative acts of the institutions and or bodies of the Republic of Liberia, determine the legality of individual and general administrative acts taken under State authority, resolve property disputes and levy tort penalties in accordance with Liberian law and international standards.”⁸³

Mechanisms in South and Central America provide additional, diverse examples of subject matter jurisdiction. In Guatemala, CICIG has three categories of jurisdiction. First, to investigate the existence of illicit security forces and clandestine security organizations that commit crimes affecting the fundamental human rights of the citizens of Guatemala and to identify the structures of these illegal groups as well as their activities, operating modalities, and sources of financing. Second, to help the state to disband these structures and to promote the investigation, criminal prosecution, and punishment of the crimes committed by the members of such groups. Third, to make recommendations to the state of Guatemala regarding public policies to be adopted—including the necessary judicial and institutional reforms—

to eradicate and prevent the reemergence of clandestine security structures and illegal security forces. In other words, the subject matter jurisdiction of the CICIG is really an anomaly in comparison with the more “traditional” mechanisms established to deal with core international crimes, but nonetheless an available model for states seeking to target other forms of criminal activity contributing to a broader culture of human rights abuses.

In Colombia, extrajudicial killings and serious human rights abuses by state and nonstate actors have been prosecuted in domestic courts, including (more recently) on the basis of domestically implemented Rome Statute provisions. Similarly, in Argentina, widespread killings, systematic torture, and abductions by death squads—while formerly prosecuted as domestic crimes—have increasingly been labeled as crimes against humanity. In Haiti, although the death of Jean-Claude “Baby Doc” Duvalier subsequently ended proceedings, on February 20, 2014, a decision of the Court of Appeals of Port-au-Prince recognized that the concept of crimes against humanity was “part of customary international law and that customary international law is part of the national law of Haiti.”⁸⁴

In Europe, there are a number of domestic or hybrid mechanisms that illustrate the complexities involved—at the more domestic end of the spectrum—in deciphering applicable laws and in ensuring their adequacy. For example, the Supreme Court of Kosovo returned a number of war crimes cases for retrial before UN Regulation 64 Panels due to confusion over applicable law. The Regulation 64 Panels’ successor, the European Union Rule-of-law Mission in Kosovo (EULEX), relied on provisions in the criminal code of the Socialist Federal Republic of Yugoslavia (SFRY), but these provisions only included war crimes, not crimes against humanity or genocide. Inadequacy of laws has also been an issue for prosecutions in Croatia, particularly with regard to notions of command responsibility and crimes of sexual violence.⁸⁵ In Bosnia, there was an attempt to avoid some of this confusion through sequencing processes: first, in 2003, the adoption of new criminal and criminal procedure codes, and then the planning for the establishment of the War Crimes Chamber, which was inaugurated in March 2005. Nevertheless, there are still disputes over applicable law at the BiH WCC and in local courts, and the new codes and old SFRY codes are still in use.

The Kosovo Specialist Chambers and Specialist Prosecutor’s Office has jurisdiction over crimes against humanity, war crimes, and crimes under Kosovo Law, but only with reference to allegations in a “Council of Europe Assembly Report.”⁸⁶ The mechanism’s jurisdiction is thus limited by reference to particular allegations.

In the Central African Republic (CAR), the Special Criminal Court has jurisdiction over gross violations of human rights and international humanitarian law, as well as international crimes defined under the CAR criminal code (genocide, crimes against humanity, and war crimes, including those under current investigation and those to be investigated in future). Finally, although not the only crimes within their jurisdiction, mobile courts operating in remote parts of the DRC have been heavily devoted to hearing cases involving sexual offenses.

All mechanisms—particularly special mechanisms established entirely outside of a domestic jurisdiction, or in parallel to it—have come to require additional subject matter jurisdiction over offenses against the administration of justice (such as perjury, obstructing or interfering with witnesses, or obstructing or bribing court officials). In the case of the earlier (ad hoc) tribunals, jurisdiction over these offenses was left to subsidiary legislation (their Rules of Procedure and Evidence).⁸⁷ By the time the Rome Statute was adopted, such offenses were included in primary legislation.⁸⁸ Also included in this category of jurisdiction is the power to sanction counsel for misconduct.

Lessons and Considerations

1. **Subject matter jurisdiction should reflect the realities of the conflict in question.** The broad consensus about prosecution initiatives for international crimes is that they should focus on international crimes of genocide, crimes against humanity, and war crimes. However, some models have excluded categories of crime that did not feature in the conflict; for example, the statute for the SCSL did not include genocide. More commonly, founding documents have granted mechanisms jurisdiction over a broader set of offenses. These have included some domestic offenses (for example, in the ECCC and SCSL mandates) included for legal or policy reasons. Other mechanisms have included a broader raft of international crimes, including such matters as terrorism and piracy (for example, in the Uganda ICD statute).
2. **Scoping missions or commissions of inquiry can provide guidance on which crimes to include in the mechanism’s mandate.** An example of this is the Liberian Truth and Reconciliation report providing recommendations for the establishment of a criminal court (i.e., the ECCL) and annexing a draft statute to the report. The report included a list of potential targets for investigation/prosecution. Caution must be exercised, however, in relying wholly on such findings—they should be viewed as preliminary only and within

the limitations under which the inquiries were conducted. Such missions may overlook some forms of crime, especially such commonly stigmatized crimes as sexual and gender-based violence; subject matter jurisdiction must provide for all potential forms of atrocity-crime, even where there may be silences around their commission.⁸⁹

3. **Mention of specific crimes of concern can provide guidance to the mechanism's implementers.** Explicitly granting the mechanism authority over specific crimes (such as sexual violence or torture) may be duplicative of a broader mandate over war crimes, crimes against humanity, or genocide, or can expand subject matter jurisdiction to include instances of crimes that do not fulfill additional contextual elements to qualify as international crimes. Doing so may be desirable where particular crimes featured heavily in the underlying situation. This can provide important guidance to the mechanism's operators and send a signal to affected populations that these offenses will not be ignored.
4. **Statutes should define subject matter jurisdiction consistent with international standards.** The use of criminal definitions that comport with international standards (including those of the Rome Statute and/or customary international law) can help ensure that the law's scope is sufficiently comprehensive with regard to specific criminal acts and chapeau elements, can prevent the application of statutes of limitations to grave crimes, and can facilitate the use of jurisprudence from other jurisdictions. If the country in question has already domesticated international crimes in accordance with international standards, or allows the direct application of such definitions, this may not be of concern. However, where neither of these is the case, the establishment of a new mechanism may present an opportunity to introduce criminal definitions of core international crimes that are in accordance with international standards. By contrast, the drafting of a mechanism's subject matter jurisdiction should avoid introducing definitions at odds with international standards. This was the case with the statute for the ECCL, recommended by Liberia's Truth and Reconciliation Commission (TRC).⁹⁰
5. **Defining the mechanism's subject matter jurisdiction should take account of the subject matter jurisdiction of other relevant judicial authorities.** It may be appropriate for the new mechanism to have overlapping subject matter jurisdiction with other institutions, but only if mandates are differentiated in other ways. For example, it may be understood that an existing international

court (such as the ICC, ICTY, or ICTR) will take on complex cases against more senior-level suspects, while domestic courts (for example, military courts in the DRC, the BiH WCC, or Rwandan domestic and *Gacaca* courts) deal with simpler cases involving lower-level perpetrators. This may be important to address the sheer number of cases in a given situation. Within a domestic system, there may be reasons for a mechanism to have differentiated temporal jurisdiction from existing authorities dealing with the same kinds of crime. However, if there is insufficient differentiation from the mandates of extant authorities, then there is a heightened risk of legal ambiguity, and even the political manipulation of such ambiguity as a means of evading accountability. Within the Rome Statute system, the principle of complementarity may make this phenomenon more common.

6. **A mechanism with jurisdiction over domestic crimes may have a greater impact on the country's legal system.** At least in theory, this may be especially true in common law countries, where jurisprudence can set important legal precedents. However, granting a mechanism an ability to apply domestic law does not guarantee that this will happen. The SCSL mandate allowed the prosecution of “crimes under relevant Sierra Leonean law,” in addition to international crimes. In practice, however, the prosecutor decided against using this latitude.
7. **Subject matter jurisdiction that is too broad may create unrealistic expectations, open avenues for obstruction, and/or render the mechanism unworkable.** Creating a mechanism that has very broad subject matter jurisdiction suggests a larger and costlier structure that is more likely to raise questions of feasibility. Such questions have emerged with regard to the proposed criminal jurisdiction of the African Court of Justice and Human Rights (ACJHR) and may have contributed to Liberia's inability to create a specialized prosecution mechanism. Further, granting a mechanism with authority over a wide range of international crimes, as with the Uganda International Crimes Division, may allow governments to attract resources in the name of trying core international crimes, while building the infrastructure for a mechanism devoted mainly to dealing with other types of crime (such as terrorism).⁹¹
8. **The mechanism will need powers to investigate and prosecute crimes against the administration of justice in addition to the international and/or transnational crimes that form its core mandate.** Any judicial

mechanism will require the requisite powers to control its own proceedings, including the power to impose criminal sanctions on those giving false evidence before it. It is preferable that this jurisdiction be created in primary, rather than subsidiary, legislation (with foresight).

Key Questions to Help Determine Subject Matter Jurisdiction

- *In determining subject matter jurisdiction, have all major stakeholders been consulted, including victims and others in affected communities?*
 - *What were the main crimes of concern perpetrated during the conflict?*
 - *What major sources of human rights and criminal documentation exist that can help determine this (including commissions of inquiry, scoping reports, and domestic and international civil society reports)?*
 - *What crimes carry particular social stigma in the society in question, such that their occurrence may have been underreported. Have organizations or entities that are focused on those types of crimes in particular been consulted?*
 - *Does the country concerned have legal definitions consistent with international standards?*
 - *Can the country directly apply treaty law, allowing it to use criminal definitions from treaties to which it is party? If so, does the judiciary have an established practice of doing so?*
 - *What other judicial authorities have jurisdiction over grave crimes? Are overlaps likely to strengthen or dilute chances for genuine and fair criminal enforcement?*
 - *Is the proposed subject matter jurisdiction realistic?*
 - *Could granting the mechanism jurisdiction over some domestic laws lead to jurisprudence that would aid broader legal reform?*
 - *Does the mechanism need explicit jurisdiction over crimes against the administration of justice, or will other elements of the justice system handle such offenses as perjury and witness intimidation?*
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2. PERSONAL JURISDICTION AND MODES OF LIABILITY

Personal jurisdiction comprises the set of actors subject to the legal power of a judicial mechanism's authority. Modes of liability comprise the basis in law by which individuals can be considered criminally responsible for crimes. Decisions to define personal jurisdiction and modes of liability narrowly or broadly will have implications for the total number of cases a mechanism might be expected to handle, with ramifications for its scale, structure, and financing. Further, it will play a major role in determining the potential liability of senior officials, with potential political consequences.

Experiences to Date

Personal Jurisdiction

Most mechanisms considered in this handbook have the power to investigate and prosecute “natural persons.”⁹² However, some recent mechanisms and proposed mechanisms, including in the DRC and Guatemala, have begun to include broader notions of personal jurisdiction, so as to include those who finance or benefit from grave crimes.⁹³ The draft Convention on Crimes against Humanity, provisionally adopted in 2017 by the International Law Commission, contains a provision on the liability of legal persons.⁹⁴

Whereas the ad hoc tribunals for Rwanda and the former Yugoslavia were granted personal jurisdiction over any perpetrator of crimes under their statutes, many hybrid and internationalized courts, including the SCSL and ECCC, have had their personal jurisdictional mandates limited through language directing them to focus on perpetrators in leadership positions and/or those most responsible for crimes.

Some models, such as Colombia's Justice and Peace Law (JPL) and Special Jurisdiction for Peace (SJP), have limited personal jurisdiction by explicitly accommodating amnesties granted to some types of suspected perpetrators (as well as through a directive from the attorney general narrowing the JPL's broad prosecution mandate in law to those “most responsible”). As in post-apartheid South Africa, the proposed statute for Liberian war crimes court cited suspects' cooperation with the truth commission as a reason to forgo their prosecution. The International Crimes Tribunal for Bangladesh recognizes an amnesty provided to those on one side of the conflict, and personal jurisdiction is further limited because it may not hear cases related to persons living outside of the country.

Modes of Liability

Different mechanisms have had a wide variety of modes of liability. The ad hoc tribunals contemplate criminal liability for those who plan, instigate, order, commit, or aid and abet in the planning, preparation, or execution of a crime within their subject matter jurisdiction. They specify that official position does not exempt an individual from criminal liability; they note the concept of command responsibility (the responsibility of superiors for the actions of their subordinates, under certain circumstances); and they note that acting pursuant to the orders of a superior does not absolve an individual from liability. These concepts have been picked up in the SCSL Statute and ECCC Law. Additionally, judges have interpreted criminal liability to include the concept of acting in concert (joint criminal enterprise).⁹⁵

The Malabo Protocol, which (if ratified by a sufficient number of states) will establish criminal jurisdiction for the African Court of Justice and Human Rights controversially limits criminal liability based on official capacity. It grants immunity to serving heads of state and government and “other senior officials” in relation to official acts. (See the discussion of international standards in relation to amnesties and immunities in II.B. RELATIONSHIP TO DOMESTIC SYSTEM.) In Colombia, a deviation from the Rome Statute’s definition of command responsibility in the 2016 law creating the Special Jurisdiction for Peace has led some observers to believe that military commanders may have de facto immunity.

The “principle of legality” can also limit modes of liability. (See also *Temporal and Territorial Jurisdiction*, below.) At the ECCC, judges found that the form of joint criminal enterprise known as JCE III (or “extended” joint criminal enterprise)⁹⁶ was not a form of liability “foreseeable to the Charged Persons in 1975-79” and that therefore the “principle of legality” required the court to “refrain from relying on the extended form of JCE in its proceedings.”⁹⁷ Uganda’s International Crimes Division has been unable to use modes of liability from the Rome Statute, which were largely incorporated into the domestic ICC Act that came into effect in 2010. The ICC Act cannot be retroactively applied due to a strict understanding of the principle of legality expressed in the country’s constitution and judicial practice. The STL Statute has been criticized for violating the principle of legality by applying uniquely international forms of criminal responsibility (namely joint criminal enterprise and command responsibility) to domestic (Lebanese) crimes.⁹⁸

Lessons and Considerations

1. **Personal jurisdiction and modes of liability should reflect evolving international standards.** Accordingly, mandates should not include immunities for heads of states and government, or other persons based on offices they hold. Perpetrators of grave crimes are often highly ranked individuals who oversaw (rather than personally physically perpetrated) the crimes, so modes of liability written into any applicable laws should be broad enough to capture a wide range of conduct. The case law of several mechanisms illustrates that the availability of various concepts of liability is particularly important to ensure that criminal accountability can be secured for crimes of sexual violence. Extended form joint criminal enterprise—crimes outside the scope of an original common plan, but nonetheless foreseeable as a consequence of the original plan—is the form of liability that has been most commonly used to secure accountability for crimes of sexual violence. States and mechanisms contemplating adoption of Rome Statute standards should note that it is disputed whether the Statute encompasses this form of liability.⁹⁹
2. **Drafters should take account of the principle of legality as understood in the country’s law and practice, as well as customary international law.** They should be clear about which modes of liability apply to which period of events under existing law, and what statutory or constitutional changes may be desirable as part of the mechanism authorization package to ensure that prosecutors and judges have the discretion to consider cases involving key suspected perpetrators.
3. **Personal jurisdiction should not be defined to shield possible perpetrators on any side of the conflict from legal scrutiny.** Exercises in one-sided or “victors” justice further divide riven societies and underscore perceptions that justice systems serve power rather than law. Although the president of Sierra Leone initially requested United Nations assistance in creating a court to try members of the Revolutionary United Front who committed atrocities (implicitly ignoring crimes by members of other fighting factions), the UN appropriately insisted on removal of this specification in the Special Court’s mandate. In the end, the SCSL convicted members of different factions, including those of a pro-government militia.
4. **Personal jurisdiction should be defined broadly enough to capture potential targets (leaving room for prosecutorial and judicial discretion), yet sufficiently defined so as not to create an indefinite mandate and**

unmanageable costs. Almost across the board, prosecution mechanisms show that significant investment and expenditure is incurred during the start-up phase, with investigations and prosecutions becoming more streamlined and efficient as experience, expertise, and institutional memory accrues.¹⁰⁰ Where a government's acceptance of an independent mechanism is questionable, particular care should be given to wording that narrows mandates. In Cambodia, critics accuse some court officials of inappropriately exploiting the mandate's wording on personal jurisdiction as a convenient legal basis to shield suspects from investigation.¹⁰¹

5. **Personal jurisdiction should be defined with awareness of other existing or planned prosecution and transitional justice mechanisms.** It should take express account of types of perpetrators of that may be left to lesser (or higher) courts, as is the case in Bosnia. It should also account for those who receive amnesty for noninternational crimes, as well as truth commissions that may deal with lower-level perpetrators (perhaps also through grants of amnesty for noninternational crimes in exchange for cooperation). Colombia offers a (troubled) example of a holistic approach to transitional justice.

Key Questions to Help Determine Personal Jurisdiction and Modes of Liability

- *In determining personal jurisdiction and modes of liability, have all major stakeholders been consulted, including victims and others in affected communities?*
- *Should the mechanism have jurisdiction beyond natural persons (for example, corporate actors)?*
- *Which standards are to be applied to the mechanism's personal jurisdiction and modes of liability, and with what implications?*
- *Does existing criminal procedure (where it is to be applied) comport with international standards on personal jurisdiction and modes of liability? If not, what constitutional and/or statutory changes might be necessary?*
- *What limits does existing domestic law (where it is to be applied) place on the application of new modes of liability, through law and practice related to the principle of legality?*
- *Do judges have a practice of applying customary international law?*

- *Does the proposed personal jurisdiction single out particular factions for scrutiny and/or shield others?*
 - *Is the potential pool of suspects large enough that limiting language may be necessary (e.g., “most responsible”) to narrow personal jurisdiction, while remaining consistent with the mechanism’s intended purpose?*
 - *If personal jurisdiction is narrowed, do prosecutors and judges nonetheless retain sufficient discretion to apply the mandate to a broad enough group of potential suspects?*
 - *Do other existing or planned prosecution or non-prosecution mechanisms of transitional justice have jurisdiction over suspects who committed crimes under the mechanism’s subject matter jurisdiction? If so, how can the mechanism’s personal jurisdiction be tailored, consistent with international standards, to take account of these?*
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3. TEMPORAL AND TERRITORIAL JURISDICTION

Temporal jurisdiction is the time period of underlying events over which a judicial mechanism may exercise authority. Territorial, or geographic, jurisdiction is the defined physical territory where events occurred, over which a judicial mechanism may exercise authority. The definition of each will affect the number of cases a mechanism may be expected to handle, with ramifications for its scale, structure, and cost. These definitions may also have important consequences for a mechanism’s fairness, popular legitimacy, and legacy, as well as the potential for creating political controversy. Finally, the definition of temporal jurisdiction may raise questions about the retroactive application of law.

Experiences to Date

Temporal Jurisdiction

With regard to temporal jurisdiction, there have been three typologies of jurisdiction. First, many mechanisms have jurisdiction over precise time periods. These include the mechanisms for Cambodia, Rwanda (the ICTR), Bangladesh, Iraq, and the Extraordinary African Chambers in the Courts of Senegal. Second, some mechanisms have mandates over particular events: the Special Tribunal for Lebanon’s jurisdiction related to an assassination; the Interdisciplinary Group of Independent Experts was dispatched to Mexico in relation to crimes that unfolded

over two days; a proposed Special Tribunal for Kenya (STK) would have had a mandate over postelection violence that occurred during just a few months in 2007–2008. Finally, there are also mechanisms that have had a defined start date for their temporal jurisdiction, but no defined end date. This was the case with the ICTY; it is the case with the International, Impartial and Independent Mechanism for Syria; and investigations and prosecutions in Côte d’Ivoire related to events following 2010 presidential elections, none with a specified end date.

Some mechanisms have struggled with issues of temporal jurisdiction as it relates to the principle of legality. (See also *Personal Jurisdiction and Modes of Liability*, above.) Courts applying international law are often required to retroactively apply contemporaneously created legal provisions. This means they must analyze whether the conduct referenced in those provisions was criminal under national or international law at the time of the commission of the offenses.¹⁰² Concerns around the interpretation of the principle of non-retroactivity of criminal law have been raised in relation to Uganda’s ICD. Similarly, the court of justice of the Economic Community of West African States (ECOWAS) controversially found that Senegalese legislative changes adopted in 2007, which incorporated international crimes into its Penal Code, “would violate the principle of non-retroactivity of criminal law if applied to prosecute crimes allegedly committed by Habré almost 20 years before.” For this reason, Senegal had to establish “extraordinary,” and internationalized chambers in order to try the Habré case.¹⁰³ In Sierra Leone, the SCSL’s Appeals Chamber ruled in pretrial hearings that the forced recruitment of child soldiers had “crystallized” in customary international law by the time of the underlying events in question, and thus could properly be charged by the prosecutor.

Territorial Jurisdiction

The territorial jurisdiction of any mechanism is usually defined to encompass the territory on which grave crimes occurred. In most cases, it is defined as the entire territory of countries concerned (including mechanisms in Serbia, Croatia, Bosnia, Kosovo, Sierra Leone, Liberia, Argentina, Guatemala, and Colombia). Where conflicts relate to a specific part of a country, there is precedent for limiting territorial jurisdiction to that area (the proposed Hybrid Court for Darfur). By contrast, there is also precedent for territorial jurisdiction that spans international borders, as with the ICTY’s jurisdiction over all countries on the territory of the former Socialist Federal Republic of Yugoslavia, and the proposed criminal chamber of the African Court of Justice and Human Rights, which would have jurisdiction over an entire continent.

There have also been models of limited and unlimited extraterritorial jurisdiction. The ICTR's jurisdiction extended to Rwandan citizens responsible for crimes committed in the territory of neighboring states. The Extraordinary African Chambers in the Senegalese Courts had jurisdiction over crimes in Chad. And, although beyond the scope of this handbook, many countries have legal frameworks allowing various forms of universal jurisdiction over grave crimes perpetrated outside their territory.

Lessons and Considerations

Temporal Jurisdiction

1. **Temporal jurisdiction should not be defined in order to bring about selective accountability.** By itself, this is no guarantee of accountability on all sides (as seen with the ICTR in Rwanda¹⁰⁴), but it is a fundamental prerequisite to fairly applied criminal accountability. Foresight at the time of a mechanism's design could enhance maximum accountability and avoid shielding certain perpetrators. From a mandate and purpose perspective, this could be ensured by the use of strong preamble language in the founding legislative instrument and/or the founding agreement with an international body. Temporal jurisdiction can be designed to enhance these prospects, or at least to provide a legal basis to ensure that all perpetrators could—theoretically—be captured.¹⁰⁵ In Sierra Leone, the start date of the SCSL's temporal jurisdiction was chosen as a “non-politically biased date.”¹⁰⁶ Nevertheless, choosing a start date may present difficult choices between a need for inclusivity and questions of ambition. In the former Yugoslavia, the ICTY had no jurisdiction over previous grave crimes committed during and after World War II; in Côte d'Ivoire, grave crimes committed during cycles of violence prior to 2010 have not been investigated and prosecuted; and neither the ICTR nor the Gacaca mechanism have examined grave crimes in the decades prior to the Rwandan genocide.
2. **Where a mechanism is being designed to address crimes in the more distant past, stakeholders must be aware of inevitable additional challenges.** For example, if evidence was not gathered contemporaneously to the events, it may be difficult to do so now. Many of those who perpetrated or experienced atrocities (victims and witnesses) may no longer be alive. The lapse of time has burdened the ECCC's attempt to investigate and prosecute historical crimes (committed 1975–1979, corresponding to the period of Khmer Rouge rule). Key accused persons, suspects, and witnesses have died in the

intervening years and during the court's proceedings. Similar challenges have faced proceedings in Argentina, Guatemala, Bangladesh, and Senegal (in relation to Chad). Prosecuting crimes of a more distant past means that often younger generations are not familiar with the facts and issues involved. This can be a challenge, but also an opportunity for mechanisms to play a truth-telling role. To do so, mechanisms may need to place special emphasis on reaching youth through outreach and public information.

3. **Mechanism designers should anticipate challenges arising from the bar on retroactive application of criminal law.** One option might be for the founding legislation to make clear that the content of the laws are taken from customary international law and, therefore, do not violate the principle of non-retroactivity. However, where it is not clear that this is indeed the case, mechanisms can become bogged down in complex pretrial litigation.

Territorial Jurisdiction

4. **Territorial jurisdiction should not be defined in ways that shield particular factions suspected of perpetrating grave crimes.** If crimes perpetrated by different factions occurred disproportionately in different geographical locations, it will be especially important to ensure that the mechanism's territorial jurisdiction encompasses these. This will be critical to the mechanism's fairness and legitimacy.
5. **Territorial jurisdiction that extends across national borders will raise ancillary considerations for those designing a mechanism.** These will include matters such as state sovereignty, cooperation, and the potential need for additional agreement(s) allowing state actors to access evidence, witnesses, territories, and suspects. Nonetheless, an expanded territorial jurisdiction may be necessary to capture the extent of criminality, especially where suspects have fled into neighboring states, or where conflict (and related atrocities) has expanded beyond state borders. This may be of increasing relevance, as many conflicts are moving away from traditional state-based (or entirely intrastate) conflict to criminal organizations operating simultaneously across multiple territories (such as Daesh / Islamic State, al-Shabaab, Boko Haram, or the Zetas cartel).

Key Questions to Help Determine Temporal and Territorial Jurisdiction

- *In determining temporal and territorial jurisdiction, have all major stakeholders been consulted, including victims and others in affected communities?*
 - *When and where were the main crimes of concern perpetrated during the conflict?*
 - *What would be the effect on the mechanism's fairness and perceived legitimacy of any proposed constraints on temporal and territorial jurisdiction?*
 - *Were acts under the mechanism's subject matter jurisdiction criminal under applicable domestic law during all times of the proposed mechanism's mandate? If not, were they criminal under customary international law, and does the system in which the mechanism will operate have legal provisions allowing direct application of customary international law or a practice of recognizing customary international law?*
 - *Where crimes have been perpetrated across borders, is there support from affected states and regional or international bodies to create a mechanism with jurisdiction beyond one country's territory? If so, what agreements may be needed to secure access to evidence, witnesses, and suspects, and to conduct other functions, including outreach, across borders?*
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D. Basis of Authority

In the establishment of a mechanism for criminal accountability, consideration must be given to the body or source providing official permission or approval for its creation. Some examples of the sources of authority—in terms of a body as well as an instrument—are:

- the United Nations Security Council (UNSC; via the instrument of a resolution);
- the United Nations General Assembly (via the instrument of a resolution);
- a domestic government, in partnership with the UN (via an agreement between the state and the United Nations);
- a domestic government, in partnership with a regional body (via an agreement between the state and the regional body);

- the relevant domestic legislative body (via a domestic legislative instrument, or series of legislative instruments); and
- a decision of the executive, where legally possible.

Clearly, there can be overlap in these categories, as some mechanisms require both international and domestic authorization.

The basis of a mechanism's authority is closely related to its relationship with the domestic system. (See II.B.) For example, a mechanism that derives its authority from a UN Security Council resolution will likely have a more distant relationship with the domestic judicial system. Conversely, a mechanism whose authority derives solely from domestic legislation will have a more proximate relationship to the domestic judicial system.

Experiences to Date

The UN Security Council authorized the establishment of the ICTY and the ICTR (through the passing of resolutions, pursuant to powers under Chapter VII of the UN Charter). In both instances, the Council determined that the situations in the former Yugoslavia and Rwanda constituted threats to international peace and security. The authority for both the SCSL and the ECCC largely derives from agreements between the UN and the Sierra Leonean and Cambodian governments, respectively. In the case of the ECCC, however, the agreement regulates Cambodia's relations with the UN in terms of international assistance to the court, whereas the ECCC Law (domestic Cambodian legislation) establishes the court. In essence, therefore, the ECCC derives its legal authority from domestic legislation.

Authority for the Extraordinary African Chambers also emanates from an agreement between the Republic of Senegal and the African Union, and like the ECCC, the EAC are located within an internationalized domestic court system (Senegal's). The Special Tribunal for Lebanon is an anomaly on this spectrum of tribunals established by a Security Council resolution or by a treaty between the UN and a domestic government because it borrows from both. There was an attempt to create the STL as a treaty-based tribunal with domestic (Lebanese) implementing legislation, similar in nature to the ECCC (though located outside of Lebanon). However, when the Lebanese government met crippling opposition in passing domestic implementing legislation, the UN Security Council stepped in to pass a binding resolution (Resolution 1757) establishing the Tribunal.¹⁰⁷

The UN General Assembly has a long history of involvement in efforts to create accountability for international crimes, including the affirmation of the Nuremberg Principles following World War II, requesting the drafting of the Genocide Convention, and passing a resolution (60/147) in 2005 to set forth “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.” The General Assembly has also had indirect and direct roles in authorizing specific mechanisms. It authorized the Secretary-General to negotiate the agreement with the government of Cambodia to create ECCC and approved the draft agreement that emerged from those negotiations. In the face of Security Council deadlock over accountability for crimes in Syria, in December 2016 the General Assembly authorized the creation of the IIIM for Syria.¹⁰⁸

Certain mechanisms, while deriving their authority from domestic legislation, have been precipitated by a partnership between domestic and international authorities for some kind of international assistance. For example, CICIG in Guatemala is a body created through a partnership between the UN and a domestic government. Although the commission derives its authority from an agreement, following endorsement by the Constitutional Court of Guatemala, the agreement was ratified by Guatemala’s Congress. The Kosovo Specialist Chambers and Specialist Prosecutor’s Office required a constitutional amendment and is part of Kosovo’s judicial system, though proceedings will be held in The Hague.

Several countries, including the Democratic Republic of Congo, Uganda, CAR, Argentina, Colombia, Haiti, Bangladesh, Croatia, and Serbia have either already-existing or emerging mechanisms that derive their authority from domestic legislation. It should be noted, however, that while all derive authority from one or more domestic legal instruments, the types of mechanisms created across these countries vary greatly; for example, CAR created a hybrid mechanism, while many other countries make use of either existing or new specialized divisions of domestic courts. In some cases, such as that of the DRC, a monist approach to the treatment of international law means that the provisions of the Rome Statute are domestically applicable from the date on which the statute came into effect for that country.¹⁰⁹ Proposals for specialized chambers in Burundi, Kenya, Liberia, and DRC have invariably stalled at least in part *because* of the fact that they require legislation to be passed domestically before being funded and becoming operational.

Another category consists of international criminal justice mechanisms that derive authority from a temporary or transitional authority or administration. Examples of

mechanisms falling within this category are the Regulation 64 Panels established by the UNMIK in Kosovo; the Special Panels for Serious Crimes (SPSC, and Serious Crimes Unit [SCU]) established by the UN Transitional Administration in East Timor (UNTAET); and the Iraqi High Tribunal (IHT) established by the Coalition Provisional Authority (CPA).

Lessons and Considerations

Security

1. **Where conflict is ongoing, creation of a justice mechanism is more likely to require authorization by external entities.** However, even where this is the case (as in the former Yugoslavia and Rwanda), the establishment of peace can then open the door to the creation of additional accountability mechanisms (for example, the BiH WCC, domestic prosecutions in Serbia and Croatia, Regulation 64 Panels in Kosovo, and domestic prosecutions and Gacaca proceedings in Rwanda). The ICTY and the ICTR notably helped to pave the way for these more domestic initiatives.
2. **Where the security situation has led a transitional authority or administration to create a mechanism, attention must be paid to how authority for it will be transferred to the new government, once established.** For example, in Kosovo the UN Regulation 64 Panels passed authority to EULEX, which has devolved greater authority to domestic prosecutors and judges.

Political and Legal Circumstances

3. **Where governing authorities might be implicated in crimes, or feel that investigations and prosecutions may be destabilizing, a mechanism requiring domestic authorization will become more difficult.** Such governments may overtly oppose the creation of any mechanism (as in Syria), support creation in theory but create obstacles in practice (as in Kenya), or create a mechanism that can be controlled to prevent the investigation and prosecution of government officials, forces, or allies (as in Uganda). In such instances, potential international partners will have a few main options: (1) try to work with the government to accept a credible mechanism that is not one-sided, as the UN succeeded in doing with the government of Sierra Leone in establishing the SCSL; (2) internationally authorize a mechanism, as the UN

Security Council did in relation to Lebanon (i.e., STL), and the UN General Assembly has done for Syria (i.e., IIM); (3) make concessions to government influence over the mechanism, as the UN did in the process of creating the ECCC; or (4) decide not to participate in the authorization of a tainted mechanism. In making these choices, stakeholders should be clear-eyed about potential long-term ramifications on a mechanism's legitimacy with different constituencies, its effectiveness, and its efficiency (including cost), and weigh these factors against potential moral, security, rule-of-law, political, and financial costs of withholding participation.

4. **Where there is political will and domestic law allows, some parts of specialized mechanisms can be created by the judiciary.** In Bosnia, for example, the plenary of judges in the State Court's War Crimes Chamber acted to create the Criminal Defense Support Section (the Odsjek Krivične Odbrane, known by its Serbo-Croatian acronym, OKO). However, politics may constrain such initiatives. For example, if a judiciary has the power to create a specialized division for international crimes, but police and prosecutors are unwilling or unable to investigate and prosecute those offenses, the division will be of little use.

Legitimacy

5. **Where a transitional authority or administration creates a mechanism, the authorizing authority's public legitimacy will broadly determine the public legitimacy of the mechanism created.** For example, in Iraq, the IHT lacked public legitimacy, especially among Sunnis, because it was created by the United States-led Coalition Provisional Authority and then run by a Shia-dominated government.
6. **Where a mechanism is established via a treaty between an international organization (such as the UN, the AU, or the EU) and a sovereign state, its perceived legitimacy and credibility can depend on that of the party with the balance of authority.** This can be seen in the slightly different sources of authority for SCSL and ECCC. In the case of Sierra Leone, the SCSL's Statute formed part of the treaty, whereas in the case of Cambodia, the Agreement and the Law addressed different substantive matters. The Cambodian government forged ahead in enacting the ECCC Law while the UN felt that there were still numerous outstanding issues to resolve (including the method of judicial appointment and oversight). The result in the case of the SCSL was

a partnership between the UN and the Sierra Leonean government, while the ECCC became a domestic court with more contested international assistance. These differences are also compounded by the different balance of power in the prosecutor's offices and judicial chambers within those courts.¹¹⁰ The extraordinary process leading to the creation of the ECCC, and the nature of the resulting institution, has had grave implications for its functioning, legitimacy, and credibility. Any international organization contemplating a form of hybrid partnership with a domestic government in the creation of a mechanism must be cautious about lending its authority to the creation of an institution over which it has little real control. Extreme caution should be exercised in circumstances where there is ample evidence of executive control over the judiciary in the state concerned.

Enforcement

7. **The use of a UN Security Council resolution adopted pursuant to Chapter VII of the UN Charter to create a mechanism can be beneficial for enforcement.** If the mechanism is created in this way, the resolution and its provisions (including arrest orders and provisions for access to evidence) become binding on all UN Member States. In practice, the authority of any UNSC resolution may be tested by opponents, and compliance in such circumstances will depend on Member States' willingness and ability to ensure enforcement.¹¹¹ UNSC authorization may even impair the perceived legitimacy of a mechanism and exacerbate some challenges to enforcement. For example, the UNSC's authorization of the Special Tribunal for Lebanon's Statute after a domestic bill to create the mechanism by an act of the Lebanese Parliament failed has been criticized as undermining the democratic process and impeding state sovereignty. Further, because the Security Council is a political body in which five powerful states hold veto power, it is able to agree to create mechanisms in some places but not in others (e.g., Syria). This can leave mechanisms created through Security Council resolutions prone to criticism that they exist to do the bidding of world powers.

Clarity of Law

8. **When an international source authorizes an ad hoc or hybrid mechanism, this can provide clarity about applicable law and procedure.** While embedding specialized international criminal investigations and prosecutions

in already existing courts or offices can have myriad discernible benefits (see II.B. RELATIONSHIP WITH DOMESTIC SYSTEM), it can be difficult to reconcile the application of domestic laws and procedures with specialized prosecutions. This can create confusion and, if not resolved prior to the commencement of investigations/prosecutions, can lead to time-consuming and resource-heavy litigation.¹¹² As noted by the OHCHR:

It is critical to clarify from the outset which domestic laws apply. Moreover, in some cases the need to amend domestic laws which are contrary to international standards could usefully form part of the negotiations on the creation of the [mechanism]. For example, in Cambodia, prior reform of the criminal procedure code and of the law of the Supreme Council of the Magistracy [the Cambodian body responsible for judicial appointments] would have greatly assisted the Extraordinary Chambers.¹¹³

Time

9. **Where domestic authorities create a mechanism, the inherently political legislative process—possibly including necessary constitutional amendments—may lead to delay or defeat.** Proposals for mixed chambers in the DRC, a special tribunal for Kenya, and proposed courts in Liberia and Burundi all failed to gain parliamentary approval. In the absence of a Security Council resolution bringing it into being, the STL might never have been established.

10. **Where the UN authorizes a mechanism, its procedures, rules, and regulations can also lead to delays in operations, the appointment of judges, and the start of trials.** This can also contribute to lengthy pretrial detention, as was notoriously the case with the ICTR.¹¹⁴ Mechanisms that are backed by the UN but are not part of it (such as the SCSL, STL, and CICIG) have greater flexibility in recruitment and other areas and are typically nimbler. Similarly, other sources of international authorization (such as the Office of the High Representative in Bosnia) may be less bureaucratic. (See also G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF; H. FINANCING; and I. OVERSIGHT.)

Key Questions to Help Determine Basis of Authority

- *Is there a government with effective control over the state in question?*
 - *Are domestic authorities interested in genuine criminal accountability for grave crimes, regardless of faction?*
 - *Is there domestic political opposition to the creation of a mechanism (by one or more factions)? If so, would an international organization's support likely help in overcoming this opposition?*
 - *Does domestic law include an adequate framework for handling international crimes? If not, would international authorization or co-authorization of a mechanism aid in establishing a suitable legal framework?*
 - *Taking account of international and treaty law, as well as geopolitics and regional politics, which international or regional bodies could potentially authorize or co-authorize a mechanism?*
 - *Is there reason to believe that there would be significant difficulties in enforcing the decisions of a mechanism related to the country, such that a UN Chapter VII mandate could be especially desirable?*
 - *Are there imperatives of timing (i.e., a peace negotiation or a political window of opportunity) that weigh against domestic or international means of authorizing a mechanism that would likely take too long?*
 - *Where a treaty-based hybrid mechanism is contemplated, what is the public perception of the partner organization being contemplated?*
 - *From the viewpoint of the partnering organization, in real terms, where will the balance of power lie with the institution being contemplated (i.e., domestic authorities, international organization, or genuinely shared)? Is this the best model for balancing the imperatives of judicial independence and fair trial rights with the need for legitimacy and desire for positive impact on broader justice-sector development and reform?*
 - *If a transitional authority proposes to create an accountability mechanism, what body will take on responsibility for the mandate when the transitional authority expires?*
 - *Under domestic law, are there elements of the mechanism that can be authorized by the judiciary?*
-

E. Location

Should the mechanism be located in the country in which crimes were committed (or in a specific part or parts of that country) or in an alternative place? If it will be outside the affected country, it may nevertheless be necessary to have in-country offices. If so, where should satellite offices be located, and what functions should they have?

There is currently consensus in the field of international criminal justice that where circumstances permit, trials should be held in-country. This is encapsulated by the principle of complementarity, upon which the ICC is based. In-country proceedings can have several benefits: (1) facilitating greater local ownership and legitimacy over investigations and prosecutions; (2) having positive flow-on effects on the justice sector and the legal profession (fostering rule-of-law development); (3) allowing greater direct participation of affected communities in the proceedings; (4) allowing a greater breadth of inquiry; (5) improving access to evidence and witnesses; (6) ensuring that mechanism officials have a better understanding of the context; and (7) being more cost-effective. Conversely, security may not allow in-country proceedings, or the judicial system may be so politicized or weak that credible investigations, prosecutions, and trials are impossible.

Experiences to Date

The modern era of international criminal justice began in the early 1990s with the creation of two ad hoc tribunals, for Rwanda and the former Yugoslavia, based outside the affected countries—in Arusha, Tanzania, and The Hague, in The Netherlands, respectively. There followed a shift from wholly international mechanisms to more localized ones. Recent exceptions to this are the Special Tribunal for Lebanon (located in The Hague), the Extraordinary African Chambers (located in Dakar, Senegal, dealing with crimes committed in Chad), and the Kosovo Specialist Chambers and Specialist Prosecutor's Office (located in The Hague). The Hague was also the venue for the trial of former Liberian President Charles Taylor, although the Special Court for Sierra Leone held all other proceedings in Sierra Leone. The Hague has likewise been home to the joint appeals chamber of the ICTY and ICTR; the Mechanism for International Tribunals, which will handle remaining legal matters for both tribunals; and the similarly mandated Residual Special Court for Sierra Leone. If it comes into effect, the Malabo Protocol would expand the jurisdiction of the African Court of Justice and Human Rights, creating an Arusha-based international justice mechanism for Africa, which could also sit in AU member states (with their permission).

Most of the mechanisms considered by this handbook are located in-country. They range from hybrid or internationalized institutions (including those in Sierra Leone, Iraq, Cambodia, and Guatemala) to purely domestic initiatives (including Argentina, Colombia, Côte d’Ivoire, Haiti, and Croatia). There are a number of additional countries where proposals for hybrid or wholly domestic initiatives have been considered and rejected, or are emerging (including Kenya, Darfur, South Sudan, and CAR). In relation to wholly domestic initiatives, in some instances, trials have been heard only in a specific court or courts, often in the capital city, as in Bangladesh, and in others cases, have been heard throughout the country, as with Gacaca proceedings in Rwanda, specialized courts in four Colombian cities, or federal district courts across Argentina. The DRC has mobile courts, in which judges, prosecutors, and defense counsel “resolve disputes and dispense justice in areas where the nearest formal courthouse is more than a week’s journey away.”¹¹⁵

Lessons and Considerations

Security

1. **If a mechanism is placed in-country amidst ongoing conflict or general instability, there can be serious implications for the security of trial participants (accused persons, witnesses, judges, prosecution and defense counsel, and other staff), as well as the protection of the mechanism’s premises, evidence, and court records.** At the Iraq High Tribunal the assassination of judges, defense counsel, and witnesses marred the proceedings.¹¹⁶ Security concerns were central to the decisions to locate the ICTR, the ICTY, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone’s trial of Charles Taylor in alternative places. Similar considerations influenced the decision to locate the Kosovo Specialist Chambers and Specialist Prosecutor’s Office in The Hague. Some lessons can be drawn from these experiences. For example, security risks arising from the profile of individual accused persons can be addressed by moving particular (high-risk) trials to another location, while keeping the bulk of (less controversial) proceedings in-country. Where there are serious ongoing security concerns, trials should generally not be located in-country. This is not just a matter of the security of the participants, which is paramount, but also the credibility and cost of the proceedings. The mechanism must be able to guarantee the safety of all witnesses so that they are able to give a truthful account of events without fear of reprisals.

Legitimacy and Access to Justice

2. **Proceedings within or close to affected societies are often perceived to be more legitimate than proceedings at mechanisms outside of the country.** Typically, there are understandably high levels of suspicion about foreign mechanisms in countries whose histories are marked by colonialization and other forms of international exploitation. The degree to which this lesson applies also depends on the level of trust that local populations have in the justice system to handle grave crimes cases. This, in turn, can vary along ethnic, linguistic, religious, regional, or other conflict fault lines. Lopsided trust in grave crimes proceedings may reflect the realities of a lopsided conflict, as in Guatemala or Bosnia, where certain communities (i.e., indigenous Mayan groups and Bosniaks) disproportionately suffered atrocities. In such cases, domestic proceedings can polarize society, but may encourage necessary historical reckoning through court proceedings. In other places, as in Côte d'Ivoire or Uganda, the pursuit of one-sided justice may be seen as legitimate by groups associated with the government, while alienating communities who watch as the system fails to hold accountable the perpetrators of atrocities against them. Indeed, in such places, many may view an externally located mechanism (including the ICC) as having greater legitimacy.

3. **Locating a mechanism outside the country in which crimes were committed usually makes it more difficult for affected communities to access justice.** Externally located mechanisms usually present significantly greater logistical hurdles to victims and witnesses interacting with investigators, prosecutors, and victim representatives. And with greater distance, it becomes very difficult for average citizens or even local journalists to observe the trials. Because a mechanism located externally typically has greater difficulty managing public information available to citizens of the affected country, it is more prone to misinformation or demonization campaigns by those who oppose its mission or its pursuit of particular cases. This can create problems for legitimacy, which in turn can make witnesses more reluctant to participate in proceedings. This makes outreach and public information efforts all the more important. Broadcasting proceedings to local populations is one way to try to mitigate the problems of distance. However, in-country proceedings are generally the best way to facilitate outreach to affected communities and reduce transportation costs of accused persons, witnesses, and participating victims. Proximity can improve public attendance (as evident in Cambodia), though not necessarily so (as evident in Bosnia).

It can also engender greater public discussion and understanding of a conflict's history. This may have a positive flow-on effect upon general human rights discourse, such as freedom of speech.

Prosecutorial and Judicial Independence

4. **When a mechanism is located in a country with systemic problems of judicial independence, a weak judiciary, and/or strong executive control over the judiciary, there is a greater risk that such issues will pervade the mechanism itself (as in Bangladesh and Cambodia), unless it has a strong international character (as in Sierra Leone).** This may be a reason to favor locating the mechanism outside the country, though doing so may not overcome such issues entirely.¹¹⁷ Deciding to locate a mechanism in-country in circumstances where there is political opposition to genuine justice (for example, because members of the incumbent government are potential targets for investigation and prosecution) may cause insurmountable delays to the establishment of the mechanism itself, including in passing legislation creating the mechanism (or creating subsidiary bodies within already-existing judicial mechanisms). This has been the experience in Kenya, Darfur, and Burundi.

Rule of Law Development

5. **When a mechanism is located inside the country in which crimes were committed, spill-over benefits to the domestic system, including through transfer of skills and/or infrastructure, can be greater.** For example, BiH WCC introduced modern courtrooms, detention facilities, and offices that could also be used for dealing with other forms of serious crime. Uganda's High Court has benefited in similar ways from the establishment of the ICD. The SCSL left to the domestic system a campus that includes a courthouse with two modern courtrooms and a detention facility. In Guatemala, CICIG has empowered a cadre of prosecutors and judges to assert their independence from the executive; through work with CICIG and protection by it, justice-sector officials have developed investigative, prosecutorial, and trial management capacities that are applicable to a broad range of criminal cases. In some places, skills and knowledge vacuums (including those created by the deliberate targeting of judges and lawyers during the conflict, as in Cambodia, East Timor, and Rwanda) can be filled by internationals working alongside nationals. This also has the potential to contribute to justice-sector reconstruction and reform.

6. **When a mechanism is situated in-country, the risks of a “reverse-legacy” are much greater.** In the case of the ECCC, despite some positive impacts, there has been a reverse-legacy in the sense of further entrenched popular skepticism about the independence of the domestic judicial system. Even with a mechanism with a partial international judiciary, the Cambodian government was still able to exercise a significant amount of control over the court’s docket (and over both Cambodian and international judicial appointees). Two independent studies (conducted in 2008 and 2010) by the University of Berkley demonstrated that, in spite of the general satisfaction of the Cambodian population with the ECCC, there was a worsening of Cambodians’ perceptions of the credibility of the justice system during the same period.¹¹⁸

Time and Money

7. **If trials are located in-country, the cost-effectiveness of a mechanism will generally be greater.** Remote courts, including the ICC, ICTY, and ICTR, have had to expend tremendous resources to send investigative, outreach, and witness protection missions to affected countries, and to transport victims and witnesses internationally to trial. Further, such operating costs as construction, rent, and maintenance for a court in The Hague or other remote locations usually far outpaces those of in-country mechanisms. By contrast, in-country mechanisms facilitate access to evidence and witnesses, and increase officials’ understanding of the context, which can help them avoid costly mistakes in the interpretation of evidence.
8. **However, in-country proceedings are no guarantee for cost-effectiveness.** If there is ongoing conflict, (as was the case in CAR as of late 2017), providing security for the mechanism can be costly. Politics are also a factor. For example, the ECCC, located in-country, has not been cost-effective, in part due to the complexity of its structure, some of which is duplicative (lengthy pretrial proceedings, followed by lengthy trials). Significantly, however, certain parts of the court—particularly the Office of Co-Investigating Judges who investigate and indict—have not been able to function for lengthy periods fully staffed. Most of this relates to the political context: government opposition to the pursuit of certain suspects. In Uganda, the international community has provided substantial support to the ICD tasked with handling international and other serious forms of crime. However, the ICD has shown no sign of dealing with alleged crimes by the Ugandan military, and as of October 2017, it was only handling one case related to the Lord’s Resistance Army. Resources

can be wasted if key actors or offices in the mechanism are unable to proceed with cases for political reasons. (See also H. FINANCING.)

9. **In locations where there is little in the way of basic infrastructure, an elaborate setup can lead to lengthy delays in operations.** In East Timor, the integration of the justice mission within a UN mission did not guarantee a smooth launch of the SPSC. The SCSL and CICIG—both UN-backed institutions, but not part of UN missions—faced numerous similar challenges in becoming operational. These problems can also arise for mechanisms located outside of the affected country, as they did for the ICTR in establishing itself in Arusha, Tanzania. (Nairobi had initially been floated as the preferred location for the Tribunal because its infrastructure is more developed than that of Arusha.) By contrast, mobile courts in eastern DRC have demonstrated that credible proceedings for international crimes need not necessarily involve elaborate physical and technological infrastructure.
10. **A hybrid tribunal that is in-country and has significant international involvement may also have positive flow-on effects on the local economy.** But where insufficient planning is given to exit strategy, this may have drastic, though unintended, negative consequences for local communities, particularly in developing countries. Transition planning needs to be discussed from conception so that, for example, gradual draw-down or handover of offices is adequately provided for.

Choosing a Location inside the Country

11. **If a decision is made to locate the mechanism inside the country, decisions must be made about where to locate the headquarters office and any satellite or mobile offices.** Standard practice is for in-country mechanisms to be based in-capital, although there may be reasons to temporarily or permanently base operations in other locations. For example, out of security concerns and because its Freetown headquarters was not yet complete, for part of 2003, the SCSL operated in large part from a temporary courthouse and detention facility on remote Bonthe Island. In a very large country, such as the DRC, it is not possible or practicable for investigators, prosecutors, or judges in the capital to handle proceedings in distant parts of the country. Likewise, victims are unlikely to have access to justice mechanisms in a distant capital. Courts in eastern DRC, including mobile courts, have largely handled grave crimes cases.

12. **Where the population is polarized and segregated, the choice of location can, perhaps unavoidably, create or reinforce perceptions of bias.** The decision to base the State Court of Bosnia and Herzegovina, with its War Crimes Chamber, in the country's capital of Sarajevo became inevitably caught up in heated disputes over federalism and secessionism. For some Bosnian ethnic communities, this location reinforced a perception of a Bosniak (Muslim)-dominated central government. The alternative in this case was far from clear, because any other solution may have fed harmful narratives of state disintegration. Nevertheless, the experience suggests that in similar contexts, the implications of location must be carefully considered.

Choosing a Location outside the Country

13. **Where there is a need to locate a mechanism outside the country in which atrocities were carried out, it may be preferable to locate it within the same region in order to capitalize on the financial, linguistic, cultural, and rule-of-law benefits.** In other words, justice may still be viewed as local (and therefore have more local legitimacy) if there is as much physical proximity to the country in which the crimes were committed as circumstances permit. For example, the ICTR was located in Rwanda's neighbor, Tanzania; and the EAC (for Chad) in Senegal.

Key Questions to Help Determine Location

1. *Is conflict ongoing or are there other major security concerns in the country/ies in which the crimes were committed?*
2. *Will trial participants (including witnesses, victims, judges, prosecutors, defense counsel, and accused persons) and/or their families assume unacceptable levels of risk if they participate in local trials?¹¹⁹ If so, what measures could be taken to mitigate these risks?*
3. *Is there good reason to believe that an in-country mechanism would further destabilize the country/region?*
4. *Are there political obstacles to the creation of an in-country mechanism that could be expected to operate fairly, with autonomy, and in keeping with international standards?*
5. *Would an externally located mechanism increase or decrease the affected society's trust in proceedings?*

6. *If in-country, will existing infrastructure support the creation of a court/ mechanism?*
 7. *Are there significant justice-sector reform or development efforts that could mitigate concerns about an in-country mechanism, and strengthen and be strengthened by its establishment?*
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F. Structure

What institutional form should an accountability mechanism take? Should it be one entity with subsidiary organs and sections, or should multiple agencies and offices be responsible for implementing different pieces of the mandate? What are the main options for the design of organs/units/offices to implement proceedings across the judicial chain? When should structures be created, and when and how should they be phased out?

Experiences to Date

Mechanisms designed to administer criminal accountability for grave crimes typically fulfill functions across the judicial chain, including investigations and prosecutions, defense, adjudication, witness protection, and detention. The mandates of some mechanisms limit them to working on only one or a few of these elements. Whether they have limited or comprehensive mandates, mechanisms have operated with various structural forms that can broadly be considered to fit along a spectrum.

At one end are mechanisms that are distributed across multiple, already-existing, domestic institutions: an attorney general's office or investigative judges working with police to develop cases; ordinary trial and appellate chambers hearing them with the support of court administrators; and national prison administrators dealing with detention issues. Of the mechanisms examined in this handbook, Argentina and the DRC offer the clearest examples of such a distributed model.

Further along the spectrum are mechanisms located within existing institutions, but where one or more structures have been specialized to handle the particular burdens of grave crimes cases. There have been many examples of this type, including the EAC in the Courts of Senegal, Colombia's specialized prosecution and magistrate courts for implementing the Justice and Peace Law, the Bosnian model, Uganda's ICD, the ICTB, and the proposed Special Chambers for Burundi. The mechanisms

may be temporary (as in Senegal, or with regard to Colombia's SJP) or created as permanent fixtures of the domestic justice system (as in Uganda).

Finally, there are mechanisms whose structures are both specialized and unified within one extraordinary entity. The wholly international ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the proposed ACJHR, belong to this type. So do the hybrid models seen in Sierra Leone and the CAR, as well as Rwanda's Gacaca model. A recently developed subset of this group includes independent entities that work in parallel with national counterparts on the same cases: the CICIG in Guatemala and the GIEI in Mexico. With the notable exceptions of the permanent ICC and ACJHR, all of these unified, extraordinary mechanisms have been conceived as temporary constructs.

Lessons and Considerations

General Approach to Mechanism Structures

Alignment with Mandate

1. **The mechanism's purpose and mandate should determine the types of structures needed.** A mandate may limit a mechanism to focus on particular parts of the judicial chain. For example, in Guatemala and Mexico, the focus of CICIG and the GIEI (respectively) is on investigations. Or, more commonly, the purpose and mandate will encompass other aspects, including the judiciary, defense, and reparations. Colombia's JPL and SJP both feature ambitious transitional justice mandates beyond prosecutions. As in Colombia, every mechanism should have access to existing or new structures that correspond to each element of its mandate.
2. **The mechanism's purpose and mandate should determine the scale of its structures.** The scale of mechanism structures, including the number of prosecution divisions and the number of trial chambers, should correlate with the mechanism's stated ambition. A court to try those "bearing greatest responsibility" for international crimes (Sierra Leone) may have only three trial chambers, whereas countries contemplating more comprehensive prosecutions (including Argentina, Bosnia, and perhaps most dramatically, Rwanda's Gacaca proceedings) will need to have broader structures in place. Where broad mandates exist, a lack of adequate structures can impede implementation: a problem encountered in the DRC and Colombia.

3. **The possibility of mobile court structures and/or the possibility of in situ hearings should be included in the design of mechanisms mandated to promote access to justice and visibility of the proceedings—especially where crime bases are in remote locations.** In the DRC, mobile courts foreseen under the domestic criminal code have made justice accessible to communities in remote parts of the country; trials for war crimes and crimes against humanity are among those that have been heard by itinerant courts sitting temporarily in small towns and villages. Similarly, Uganda’s ICD, which is usually based in Kampala, has held hearings in the country’s north, where communities most affected by the crimes at issue find it much easier to follow the proceedings. (See also II.E. LOCATION.)

4. **Structures prescribed in the mechanism’s primary instruments (legislation or statutes) can help ensure that there are human and financial resources to implement important elements of the mandate.** Where such structures are not specified but instead left to judges and mechanism administrators to create, there is a risk that they will be insufficiently robust, emerge with delay, or not emerge at all. This has been seen with regard to defense at the ICTY and ICTR, and with outreach and reparations at many mechanisms. In East Timor, there was no mention of witness protection in the UN decisions authorizing the serious crimes process, and no witness protection structures were created, seriously marring the proceedings. (See specific lessons on structures for each of these areas, below.)

5. **Prescribing structures in primary instruments should be weighed against potential benefits of flexibility when mechanism operators have delegated authority to determine structures.** Operators may be better placed to determine the design of structures that account for operational need, dynamic political contexts, and the availability of complementary efforts by other state, international, or civil society actors. There is arguably a higher premium on flexibility when dealing with highly fluid contexts and new types of institutions. The success of CICIG in Guatemala has been ascribed, in part, to the great discretion left to the institution to determine its priorities and the internal structures best suited to meeting them. Similarly, in creating the IIIM for Syria—which must operate in parallel and in conjunction with a large number of diverse stakeholders in a tremendously complex context—the UN General Assembly specified the types of experts who should fill out a Secretariat, but did not prescribe how the mechanism should be internally structured.

Autonomy

6. **The advisability of creating mechanism structures that are autonomous from national or international institutions is highly context-specific.** An assessment of the real and perceived independence and integrity of authorizing institutions (whether national governments or international institutions), and that of mechanism implementers should determine the appropriate level of autonomy for a mechanism's structures. The IHT suffered from its strong dependence on the widely distrusted American-led CPA. In Cambodia, the ECCC was arguably designed with insufficient reliance on the United Nations and has suffered from its dependence on a national judiciary prone to executive influence. The structures of the proposed hybrid court for Darfur would likely have faced distrust from victims and the international community due to its reliance on the Sudanese state, which was heavily implicated in the underlying crimes. By contrast, in Senegal, the EAC successfully relied on the institutions of a willing, impartial state and its capable, independent judiciary. The question of appropriate structural autonomy intersects with other aspects of mechanism design. (See II.A. PURPOSE; II.B. RELATIONSHIP TO DOMESTIC SYSTEM; and II.D. BASIS OF AUTHORITY.)

7. **Autonomous institutions often lack political support when they take actions that have significant political implications, and so they must have structures capable of building constituencies for enforcement.** When the SCU in East Timor indicted powerful Indonesian General Wiranto—at the time a presidential candidate in Indonesia—both the United Nations and the Timorese government distanced themselves from the decision, leaving the mechanism politically orphaned. At the ICTY, despite its Chapter VII mandate, most states were unwilling to prioritize cooperation issues in their relationships with Serbia at a time when it was shielding major war crimes indictees, including Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic; it used financial leverage derived from the U.S. Congress and the determination of The Netherlands and Belgium to block progress in Serbia's accession to the European Union in order to eventually achieve custody of the fugitives.¹²⁰ Similarly, the SCSL faced a major challenge in achieving the arrest of former Liberian President Charles Taylor, following his exile to Nigeria pursuant to an agreement among Nigeria, the United Nations, the AU, South Africa, the United States, and the United Kingdom.¹²¹ The eventual successes of the ICTY and SCSL in securing politically sensitive arrests over fierce opposition was, in part, due to capacity within the prosecutors' offices

and registries of both mechanisms to play appropriate political and diplomatic roles within broader coalitions demanding enforcement.

Efficiency

8. **Trying to implement an accountability mechanism in partnership with a government not fully committed to the project can require additional structures, thus creating inefficiency.** The ECCC is often said to follow a civil law tradition (and structure), yet it is a much more procedurally and substantively complex structure than the Cambodian domestic court system, or the French system from which it is derived. A case before the ECCC travels through a pipeline of often duplicative processes. In addition to having more steps in the process, there are more judicial officers involved at all stages of the proceedings than in the SCSL, ICTY, or ICTR, for example. In order to ensure that the ECCC could be established more or less on the terms demanded by the Cambodian government, the UN had to create additional processes designed to overcome political interference in the court's docket (known as disagreement procedures). These additional mechanisms have resulted in additional litigation before the court's Pre-Trial Chamber (disputes between the co-prosecutors and the co-investigating judges) and associated costs and expenditures.
9. **Phasing in structures only as they are needed can lead to cost savings.** The agreement between the UN and the Cambodian government to establish the ECCC contemplated a "phased-in approach ... in accordance with the chronological order of the legal process"¹²² with a view to achieving efficiency and cost-effectiveness. In Sierra Leone, the Special Court only created a third Trial Chamber when the first two were occupied and new cases were ready. In Senegal, the Appellate Chamber at the EAC was only created following the trial verdict. And in the CAR, the SCC was operationalized in phases. However, poor timing can cause problems. In East Timor, the late establishment of the Appellate Chamber for the Special Panels created inefficiencies and delays throughout the judicial process. Careful strategic planning within each specific legal context is needed to determine which structures will be needed at which times.
10. **For temporary mechanisms, the phase-out of structures should be planned at the outset.** One option for mechanisms operating in countries undergoing broader justice-sector reform is for its structures to devolve

responsibilities to national institutions as the reform process progresses. For example, the temporary international Registry accompanying the BiH WCC and specialized prosecution office was initially responsible for the selection of international judges; once a reformed national High Judicial and Prosecutorial Council became functional, it took over this responsibility as one step of a gradual phase-out of international involvement in the mechanism. Other mechanisms have transferred responsibilities at the end of their mandates. The SCSL, for example, transferred responsibility for the ongoing protection of witnesses to national authorities as part of its exit strategy. In Sierra Leone, court infrastructure was also handed off to state authorities as the mechanisms' mandates drew to a close.

Considerations for Specific Structures

Chambers / Judiciary

11. **Decisions about the mechanism's purpose and its relationship to the domestic system, which in turn should take account of various factors (See II.A. and II.B.), will largely determine if it can make use of existing chambers, or if specialized chambers are required.** Countries with generally more advanced capacities, including Argentina, have used existing courts, as has the DRC, through its ordinary military and (more recently) civilian courts. Other countries have chosen to use domestic courts, but establish specialized chambers with judges trained in international criminal law and possessing such skills as dealing with victim witnesses. These include Uganda, Bosnia, and Senegal, as well as proposals for mixed chambers in the DRC and a Special Tribunal in Kenya. Some of these specialized chambers have included international participation, while others have not. (See II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.)

12. **Creation of high-risk courts can boost judicial independence.** Judges who face severe security threats may be more prone to compromising their judicial independence. Guatemala established "High Risk Courts" to deal with sensitive cases, including those involving grave crimes and grand corruption. The judges on these pretrial, trial, and appellate courts receive security protection for themselves and their families, and the courtroom facilities are more robust. Some judges serving in these purely domestic courts have made rulings against the interests of very powerful individuals even as they have continued to receive threats.

13. **Where long, complex trials are anticipated, the inclusion of reserve judges on the panel can ensure continuity in the event that a judge is unable to continue.** At the ICTY, the presiding judge in the years-long trial of former Serbian President Slobodan Milošević had to step down just as the prosecution was completing its case. The appointment of a “substitute judge” who had to review evidence presented to that point caused further delay.¹²³ The SCSL included a reserve judge on the panel hearing the case of former Liberian President Charles Taylor, and the STL has two reserve judges (one national and one international) on its panels. Reserve judges hear evidence and listen to but do not participate in judicial deliberations.

Investigations and Prosecutions

14. **Strong consideration should be given to establishing an investigation and prosecution office with specialized knowledge and skill.** For these types of cases, investigators and prosecutors must have strong familiarity with international criminal law and skills in such areas as the management of complex cases; interviewing witnesses; interacting with vulnerable witnesses; interacting with “insider” witnesses; ensuring the protection of witnesses who may face severe threats; identifying and using expert witnesses; using documentary evidence; conducting financial investigations; and using evidence from forensic investigations. In contexts where extensive atrocities have been committed, prosecutors must also have the skill to draw up a prosecution strategy that determines which cases to pursue and how. Many of these skills will be largely or wholly unfamiliar to police and prosecutors who have only ever handled ordinary crime cases. Unless there is an ambition to comprehensively prosecute all grave crimes (see II.A. PURPOSE) and attempt to develop these skills among police and prosecutors across the board, then it makes sense to focus on skill development for officials working in specialized teams. Thus, even in such locations as Argentina and Guatemala, where cases have been adjudicated before nonspecialized chambers in the ordinary justice system, prosecution and investigation teams have been specialized.
15. **Even in mechanisms that are largely external in nature, vetted national police investigators should be included in investigation and prosecution teams where possible.** Domestic police are familiar with local communities, speak local languages, and have myriad useful contacts. Foreign investigators will never have these advantages. In many difficult settings, vetting processes can be used to identify and select conscientious, motivated local investigators

to be integrated into investigation and prosecution teams. In Sierra Leone, the Special Court's success in conducting investigations and achieving the cooperation of local police in politically controversial arrests would not have been possible without the integration of Sierra Leone police in the Office of the Prosecutor's investigations division. However, it is inadvisable to draw on domestic police if the forces were heavily implicated in atrocities, are hopelessly politicized, and/or marked by ethnic, linguistic, religious, or other biases. Where local police forces are extensively discredited, mechanisms can still seek investigators with strong local knowledge from among individuals who have documented crimes on behalf of national human rights commissions or local civil society organizations.

16. **There are significant advantages to building joint investigation–prosecution teams.** In settings where national criminal procedure determines structures, this will often define the roles of investigators, investigative judges, and/or prosecutors, as well as their relationships and the structures within which they interact. (See II.B. RELATIONSHIP TO DOMESTIC SYSTEM.) In some systems, the process will be “horizontal,” with cases moving from office to office depending on the stage of the case (pretrial investigation, trial, or appeals); for mechanisms handling a large number of similar cases, such an approach may create efficiencies.¹²⁴ However, in most situations, mechanisms tasked with the investigation and prosecution of grave crimes face the challenge of developing a relatively small number of highly complex cases, and thus a “vertical” structure is more advantageous.¹²⁵ Accordingly, where the drafters or operators of new mechanisms have discretion to determine these structures, they should strongly consider organizing teams that integrate prosecutors and investigators under a prosecutor's direction. At the ICTY, ICTR, and SCSL, practice shifted in this direction over time because the development of joint teams ensured better communication throughout the process of case development, decreased institutional tensions between investigation and prosecution divisions, better ensured that investigators were focused on pursuing high-priority leads from a multitude of possibilities, and helped avoid instances of investigators using practices (such as excessive witness compensation) that could later create problems for prosecutors at trial. At the ICC, the Office of the Prosecutor formed joint teams composed of three divisions of the office (investigations, prosecutions, and cooperation), but a model based on consensus among the three led to tension and inefficiency.¹²⁶ By 2015, the office had shifted to integrated teams directed by senior trial attorneys, along the lines of best practices developed at the ad hoc tribunals.¹²⁷

17. **The merits of organizing investigation and prosecution teams by geography, suspected perpetrators, or other factors should be carefully weighed, and decisions should be made in light of the needs of the particular context.** In Bosnia, the Special Division for War Crimes in the Prosecutor's Office created five teams, each responsible for a particular region of the country, and a sixth dedicated to one large-scale crime (Srebrenica). This had the advantage of allowing investigators and prosecutors to develop detailed knowledge of events and actors in the regions of interest. In Sierra Leone, prosecution and investigation teams were largely organized by armed factions under investigation: rebels and an allied military junta, and a pro-government militia.¹²⁸ This allowed team members to develop particular expertise on the hierarchies of the organizations involved. Some prosecutors' offices have also hired experts in particular kinds of crime, such as sexual and gender-based violence, or crimes against children. This can help ensure that crimes that are often under-investigated receive appropriate attention.
18. **To avoid the pitfalls of investigators and prosecutors working in silos, prosecutors' offices should ensure resources for cross-cutting structures.** Common criminal analysis sections can help ensure that evidence collected by different teams is analyzed for patterns. In Argentina, the autonomy of district prosecutors pursuing grave crimes cases created a natural geographic specialization. However, because the prosecutors were initially not working together, they failed to detect the kinds of patterns in crime occurring across their jurisdictions—evidence that crimes were widespread or systematic, which are necessary elements to establish crimes against humanity. Argentina eventually established a Coordination Unit for this purpose. Similarly, a legal advisory section working for all teams, as in Bosnia, can help ensure consistency of legal argumentation across different cases. And experts in particular crimes (such as sexual and gender-based violence, crimes against children, or enforced disappearances) or investigative methods (such as financial forensics, mass-grave exhumation, or wiretapping) can serve as common resources to teams.

Defense

19. **To ensure that fair trial rights are upheld, a mechanism must provide for defense structures at the outset.** When the UN peacekeeping mission established offices for the prosecution and adjudication of international crimes in East Timor, it initially made no provision for a defense office. The establishment of a Defense Lawyer's Unit two years later led to some

improvement, but inadequate representation of accused persons amounted to an abuse of their fair trial rights.

20. **Defense structures should be autonomous to ensure that they serve the accused and not politically biased officials or the bureaucratic priorities of court administrators.** In domestic systems, local bar associations may be aligned with government or other factions, leading to the assignment of counsel for the accused who have conflicts of interest; this can ultimately damage the mechanism's fairness and credibility. In such situations, it may be desirable to establish an independent defense office to supplant or augment the ordinary process.¹²⁹ In Kosovo, the Organization for Security and Cooperation in Europe (OSCE) established a Criminal Defense Resource Center to support defense before the UN-administered Regulation 64 Panels; in Bosnia, a Criminal Defense Support Section was initially part of the Registry but became an independent organization. Within international tribunals, there has been an evolution in the status of defense offices.¹³⁰ While the statutes of the ICTY and ICTR articulated a number of fundamental due process guarantees,¹³¹ the creation of offices to ensure that those guarantees were properly respected was left to the Registry, almost by default (and provided for through subsidiary judge-made rules).¹³² At the ICC and SCSL, the defense offices were still formally within the Registry, but granted significant autonomy. At the STL, the defense office was created as a fourth independent court organ.¹³³ Momentum in this direction is also reflected in the design of the proposed ACJHR, where a defense office would have the same status as the prosecutor's office.
21. **There should be clarity about which structure is responsible for administering the list of eligible defense counsel before the mechanism, and which office is responsible for administering a transparent appeals process for lawyers whose applications are refused.** In domestic systems, which lawyers will have standing to appear before the courts will normally be clear under local law, but this will likely need to be augmented by a special mechanism that can screen potential defense lawyers for skills beyond those required to appear in ordinary criminal cases; upholding fair trial rights will require counsel knowledgeable in international criminal law and its application. In Bosnia, a new kind of hybrid defense office has offered training and expertise to domestic lawyers and is responsible for determining which members of the local bar associations are qualified to appear before the specialized BiH WCC. In hybrid and ad hoc tribunals, as in Sierra Leone

or Rwanda, a defense office typically develops and administers the criteria by which lawyers are chosen for a list of available legal representatives, from which clients may choose. A Registry or judges would be responsible for hearing appeals from lawyers who want to challenge rejections. No matter which structural options are chosen to fulfill these responsibilities, transparency in the process is paramount.¹³⁴

Victim Participation

22. **Where the purpose and mandate of a mechanism foresee victim participation, there must be structures in place to facilitate this and handle large numbers of applications.** Some domestic systems, particularly civil law systems, may already have structures in place to facilitate victim participation in the proceedings, including legal representation in court, but also the provision of psychosocial assistance to those appearing in court and assistance in accessing procedures for reparation. In Senegal, for example, victim participation in proceedings is a standard practice. In Colombia, the National Ombudsman's Office is responsible for providing legal aid to victims under the JPL. Where the mechanism is less integrated in a domestic system with such structures, there may be need to create new offices, as at the ECCC and the STL. Such structures will need to be able to establish streamlined processes to determine whether victims are eligible to participate in the proceedings. Considering the number of victims inherent to most contexts in which grave crimes have been committed, they will also likely need to be responsible for establishing databases that can help manage large numbers of victim files. For fulfillment of some functions beyond victim legal presentation in the proceedings (such as provision of psychosocial assistance), it may be possible for the mechanism to establish referral agreements with external actors, including nongovernmental organizations.

23. **In designing structures to facilitate victim legal representation before the mechanism, thought must be given to how to represent large numbers of victims in court.** In Colombia, the JPL provides victims a right to directly question the accused about crimes that affected them. The ECCC initially allowed victims to be represented in trials either individually or in groups, but when that proved unwieldy, it shifted to a system of collective representation in which co-lead counsel coordinated actions by lawyers representing different groups. Other variations of common legal representation have been used at the ICC and STL. When designing criteria to group victims for the purpose of

joint legal representation, it is important to ensure that victims with conflicting interests are represented by separate lawyers. Further, the structure should have capacity to support victim lawyers in fulfilling their obligation to consult regularly with their clients, who often may be quite numerous and—depending on the context—possibly spread over large, remote geographical areas; hard to reach electronically; and/or in communities with high rates of illiteracy.

Reparation

24. **Structures must exist to administer reparations where this is a part of the mechanism’s purpose and foreseen in its mandate.** Where mechanisms are established within domestic systems that already have an established procedure and practice for administering reparations, structures and responsibilities may be clear. Yet these may still not be equipped to deal with issues that may emerge in grave crimes cases. Structures administering reparations for grave crimes will likely need to be authorized to trace and freeze the assets of (possibly powerful) convicted persons and to cooperate with officials in other states toward these ends. Further, it is commonly the case that the assets of convicted persons cannot be located, or they are indigent. For this common eventuality, it can be important to establish a reparations trust fund, as at the EAC in Senegal. As this experience shows, however, a trust fund alone will likely be inadequate unless it is staffed to raise funds or where another office (such as an administrator or registrar) is clearly mandated to do so. (See II.H. FINANCING.)

Administration

25. **The nature of structures for administration of the mechanism will be determined by its relationship to the domestic system, its basis of authority, and whether it incorporates international judges and staff.** A purely domestic process, as in Argentina, will use established structures for court administration. Where there is temporary international involvement and/or a limited mandate, as in Senegal or Bosnia, domestic institutions may need to be temporarily supplemented to handle the special needs inherent to grave crimes cases. These include the management of nonjudicial functions that may include outreach and public information, the management of relations with the international community around the proceedings, and the recruitment and management of participating international officials. At the EAC, this supplemental capacity took the form of an additional administrator

within the Registry of the domestic system. In Bosnia, where the external component was much more pronounced, it took the form of an adjunct Registry that gradually transitioned from international to domestic control. A heavily externalized hybrid or ad hoc court, such as the STL, ICTY, or ICTR, may have a large Registry to manage all aspects of court administration, including personnel, finance, security, procurement, court management, interpretation and translation, outreach, witness protection and support, and the maintenance of archives.

Outreach

26. **Any mechanism of accountability for grave crimes must have a dedicated structure to conduct outreach to affected communities and stakeholders.** In East Timor, the UN launched the SCU and Special Panels with no outreach structure or capacity, leaving their activities opaque to the communities they were meant to serve.¹³⁵ The ICTY had no outreach program in its first six years, ceding the space to define its role and activities to nationalist forces in the former Yugoslavia, which had self-serving reasons to oppose the work of the Tribunal.¹³⁶ The IHT never had a structure for outreach. By contrast, the outreach unit of the SCSL developed innovative ways to interact with communities across the country before, during, and after trials. With strong support and engagement from court principals, these methods included interactive forums at schools and other venues, where victims, school children, police, members of the military, or the general community could hear from court officials and share their views on the court's work; the unit also screened summaries of trial proceedings, participated in radio call-in shows, and organized theater skits and conferences about the court. The court's Registry organized the Special Court Interactive Forum, in which local civil society representatives could meet monthly with senior SCSL staff from all sections to ask questions and exchange views. The court was often at pains to convince donors to support outreach, which many viewed as not being a "core" court activity. (See II.H. FINANCING.)

27. **Civil society organizations can augment and be vital partners for mechanism outreach structures, but not replace them.** To be effective, outreach cannot be simply outsourced to nongovernmental organizations. To gain public trust, accountability mechanisms must be able to articulate information about what they are doing and why. And if affected communities are to feel that the mechanism is aware of their views, then mechanism

officials must participate in outreach events, even if there are limits on what they can say about active cases. While this kind of engagement requires resources and structure, civil society organizations can still be vital partners. For example, in Sierra Leone, local and international nongovernmental organizations (NGOs) conducted outreach-type events about the SCSL mandate prior to and during its establishment. The EAC in the Courts of Senegal developed a novel approach to outreach to deal with the challenge of engaging communities in both Senegal and Chad. The court's administrator contracted with an NGO consortium comprised of international experts and local organizations in the two countries that were familiar with the local context and community networks. The consortium was able to organize events and trial screenings, and provide community feedback to court officials. However, delegating outreach functions to civil society organizations is not a simple solution to limitations in the mechanism's funding, because NGOs may have similar difficulties in fundraising for outreach activities.

Witness Protection and Support

28. **An assessment should determine whether new structures for witness protection and support are required.** Countries in question may already have provisions for witness protection measures and witness support that may be rooted in the criminal procedure code, criminal code, executive decrees, rules of court, or special legislation. An assessment should be conducted to determine whether existing mandates and structures are effective at assessing the risks faced by individual witnesses, reducing risk inside and outside the courtroom, maintaining witness privacy where required, responding to threats, and relocating witnesses when necessary. Similarly, there may be provisions already in place to provide psychosocial and medical assistance to vulnerable witnesses, but the efficacy of existing measures to deal with the nature and scale of the crimes should be assessed.

29. **Where state institutions mandated to implement protection measures may be implicated in crimes or controlled by or allied with perpetrators, they will not perform well.** In Serbia, for example, the police Witness Protection Unit, mandated to protect witnesses in war crimes trials, has been accused of having perpetrators among its ranks and engaging in witness intimidation. Within a deeply divided society, such as in Bosnia or Côte d'Ivoire, witness protection officials may have the trust of one community while enjoying little in others. This may be a matter of perception or

reflect a reality of “victors’ justice” being pursued by a mechanism that is fundamentally flawed (as in Bangladesh). Where there is reason to believe that societal divisions will cause mistrust of domestically administered protection measures or programs, new accountability mechanisms should consider establishment of a witness protection structure under international leadership (as was temporarily the case in Bosnia) or with international participation. (See II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.)

30. **Where mechanisms lack witness protection and support structures and capacities, outside actors can mitigate some of the risk of harm.** In the DRC, domestic grave crimes trials have proceeded without resources or structures for witness protection and support, and this has left witnesses exposed to physical risk, intimidation, and trauma. Although an inadequate solution, the UN peacekeeping mission, diplomatic missions, and nongovernmental organizations have filled some of this gap by taking such actions as relocating some witnesses or referring them for psychosocial assistance.¹³⁷
31. **Mechanism designers should make a point of consulting rule-of-law reformers, implementers, and donors with regard to witness protection in the country concerned because it is an area ripe for collaboration.** The creation of a new accountability mechanism, whether temporary or permanent, can provide impetus for countries to establish witness protection programs for the first time. In Guatemala, one of CICIG’s early priorities was to propose the establishment of a witness protection program within the Attorney General’s Office and new court rules allowing protected witnesses to testify by video connection.¹³⁸ Both have been vital not only to CICIG-developed grand corruption cases but also to the ability of national prosecutors to pursue grave crimes cases against powerful suspects. In Uganda, officials involved in the establishment of the ICD recognized witness protection as a priority early on,¹³⁹ and several years later, a witness protection bill is on the parliamentary agenda.
32. **Structures for witness protection and support must exist after the departure of a temporary mechanism.** Some witnesses will have protection and support needs long after a temporary mechanism closes down, and from the beginning, there should be a plan to ensure that vulnerable witnesses are cared for by follow-up structures. For example, the MICT will take on judicial oversight of protection issues in relation to the ICTY and ICTR, and the Residual Special Court for Sierra Leone (RSCSL) will do the same in relation

to the SCSL. Furthermore, in Sierra Leone, the SCSL's Victim and Witness Section invested time and resources in training dozens of national police who would be responsible for implementing ongoing protection.

Detention

33. **If detention facilities are inadequate, it can undercut the mechanism's achievements and impact.** The lack of adequate detention facilities can prevent the conduct of effective investigations and threaten the security of witnesses and that of mechanism personnel and premises. In the DRC, tremendous efforts by national courts to conduct trials for international crimes, which have received significant assistance from NGOs and international donors, have been diminished by reliance on unreliable domestic prisons. Numerous individuals convicted of grave crimes have easily escaped.¹⁴⁰

34. **If new detention facilities are established that meet international standards to serve an accountability mechanism for grave crimes, attempts should also be made to improve conditions in the country's ordinary detention facilities.** Otherwise, the juxtaposition between alleged war crimes suspects enjoying proper conditions while those accused of lesser crimes are in squalid, overcrowded prisons may lead to criticism of the mechanism as a whole. This was a challenge for the SCSL, although perhaps somewhat mitigated by the court's investment in the training of national prison staff and the eventual transfer of its modern detention facility to the government.

Key Questions to Determine Structure

- *For each element of the mechanism's stated purpose and mandate, what institutional structures may be required to enable implementation?*
- *What does the breadth of the mandate suggest about the scale of structures necessary for implementation?*
- *What design options exist that would allow the most affected communities to access the mechanism—for example, enabling mobile courts or in situ hearings?*
- *In the context at hand, is there risk that some elements of the mandate important to the mechanism's success will receive insufficient attention without structures that are prescribed through primary instruments (legislation or statutes)?*

- *Does the fluidity of the situation at hand suggest that key decisions about mechanism structures should be left to mechanism operators to determine?*
- *Are domestic governments and/or international institutions that are authorizing the mechanisms perceived as impartial by affected populations; and can national governments be trusted not to politicize judicial structures? If not, would mechanism structures that are more autonomous from the state and/or international bodies be protected from improper influence and be perceived as more legitimate?*
- *If it is expected that the mechanism will face domestic and/or international resistance to its judicial decisions, will its structures have the capacity to engage effectively in diplomatic and political discussions to encourage enforcement?*
- *What structures will be critical at the outset of the mechanism’s establishment, and which might await establishment until more advanced stages of the judicial process or a scaling-up of operations?*
- *For temporary mechanisms, how will structures phase out over time, and what institutions will take over necessary residual functions?*
- *Do national justice sector capacities suggest that it would be feasible to use existing structures (in one or more areas), or rather, that creation of new, specialized structures is required?*
- *Do judges and their family members face significant threats that could be mitigated through the creation of high-risk courts?*
- *Are investigators and prosecutors familiar with international criminal law; the management of complex cases; dealing with insider, expert, and vulnerable witnesses; and using documentary and forensic evidence of types that are likely to occur in the given context?*
- *Is it possible to involve domestic police in investigations, including through setting up a vetting mechanism? If not, what other sources exist for the recruitment of domestic investigators with strong knowledge of the context?*
- *Is it anticipated that the mechanism will process a high number of cases—suggesting a more “horizontal” structuring of investigations and prosecutions—or relatively few large cases, such that a “vertical” structure makes more sense?*
- *What prosecution office structures or means of collaboration are required to allow prosecutors to see patterns of criminality across areas of focus for particular teams of investigators and prosecutors?*
- *In domestic systems, are local bar associations seen as impartial and independent by affected populations, or is there need for an independent defense office to deal with grave crimes?*

- *Is there clarity about which structure will determine which counsel will have standing to represent the defense before the mechanism and which structure will hear rejected lawyers' appeals?*
 - *Where victim representation is included in the mechanism's mandate, which structure will be responsible for organizing it?*
 - *How many victims might be expected to seek representation in proceedings before the mechanism, and how can structures be designed to facilitate coordination among individual victim representatives, group representation, and consultation by victim counsel with affected communities?*
 - *Where reparations are part of the mandate, what types are foreseen, and what structure will administer individual and/or group reparations, trace and freeze the assets of convicted persons, and/or establish a trust fund and raise resources for it?*
 - *What administrative competencies can be implemented by structures of the ordinary justice system, and which may necessitate the creation of supplementary structures or a large, special registry?*
 - *Which structure will be responsible for the design and implementation of outreach to communities affected by the mechanism's work? How do the geography of affected communities and the existence of civil society capacity affect the structure's design?*
 - *Are existing mechanisms for witness protection and support effective and trusted by the population? How large is the pool of prospective threatened and vulnerable witnesses, what types of risk and trauma do they face, and what domestic and international partners may be available to assist the mechanism to provide protection and assistance?*
 - *Have those tasked with protection and implementation mandates in the ordinary justice system been implicated in the crimes, or are they perceived by affected communities to be allied to any group of suspected perpetrators of grave crime?*
 - *Have reformers, donors, and implementers working on the ordinary justice system been consulted about potential areas of overlap in the provision of witness protection and support?*
 - *If the mechanism is temporary, what structures will assume continuing obligations of witness protection and support at the end of its mandate?*
 - *Are there adequate detention facilities and management to meet the mechanism's expected needs?*
 - *How can the development of new or improved detention facilities and capabilities in relation to grave crimes cases benefit detention facilities and management in the broader justice sector?*
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G. Integration of International Judges and Staff

Under what conditions does it make sense to include international judges and staff in a mechanism? Where they are included, and what is the scale and form of their participation? What qualifications should the mechanism expect from international participants? What form should the selection process take in order to recruit international participants, and how should they be held accountable for their conduct while working for the mechanism? What processes can be put in place that foster collegial relationships among national and international officials, with benefits for capacity building and the mechanism's casework?

Experiences to Date

Accountability mechanisms that have included international judges and staff have done so for one or more of these main reasons: (1) to insert impartiality into a mechanism dealing with issues that have polarized societies and domestic institutions, and thus to enhance public trust in the objectivity of a mechanism's operation and outcomes; (2) to lend substantive expertise in contexts where local justice-sector officials lack knowledge or experience in international criminal law or other relevant skills (including logistics, security, and other operational matters); and (3) to build the capacity of local officials through collaboration and training. Success has varied in response to a variety of factors. Most notably, these have been the quality of international officials recruited, and whether international involvement is designed in ways that foster collegiality with national counterparts rather than generate resentment.

The extent of international participation in accountability mechanisms has varied widely. In some places, as in Argentina, Bangladesh, and Uganda, there has been practically no international involvement apart from occasional expert advisors or trainers. At the Extraordinary African Chambers, domestic Senegalese judges and officials were predominant, but internationals played roles on the trial bench, in victim representation, and in outreach. In Sierra Leone, international officials played a much more prominent role through all sections of the court's operations, and at the fully international ad hoc tribunals for the former Yugoslavia and Rwanda, there were only international judges, and international staff predominated.

The form of international participation has also varied. In many models, internationals' primary responsibility has been to directly administer proceedings as judges, prosecutors, victim and defense counsel, and court administrators, among

others. These include the ad hoc tribunals and mechanisms for Cambodia, CAR, East Timor, and Lebanon. In internationalized domestic courts, such as those in Bosnia and Kosovo, there has been a heavier emphasis on capacity building for domestic counterparts. International involvement through mentorship has been even more pronounced elsewhere, taking various forms, and with varying levels of success. In the DRC, UN-organized Prosecution Support Cells have placed international investigators into active domestic investigations in an advisory capacity. Initially, the model—which has been adapted for use in the CAR—struggled because the international investigators’ contracts were so short that they could not understand the context and cases well enough to make useful contributions before their departure. In Guatemala, CICIG has a mandate that allows it to conduct independent investigations, but in order to come to court, cases must be introduced by the Attorney General’s Office. CICIG has played a major role in recommending reforms to that office, and as these reforms have taken hold, CICIG has increasingly conducted joint investigations with national counterparts. The result has been the development of a skilled cadre of local prosecutors and police who take their autonomy seriously.

The qualifications required of international judges and staff, and the resulting quality of international officials, have varied across mechanisms and within them. Some judges and staff have contributed substantive knowledge gained through years of experience, been motivated by the mission of implementing justice effectively, and have been respectful, effective colleagues to national counterparts (where applicable). However, other internationals have had insufficient experience or knowledge, shown little dedication to their work, and treated national counterparts with condescension. While quality of personnel varies in any organization, when it comes to the quality of international judges and staff, selection processes have largely determined which qualifications apply and the ultimate mix of good and bad.

The selection of judges at the UN tribunals and the ICC has relied on states to make nominations according to disparate, often nontransparent criteria. At the ICTY and ICTR, judges were elected by the General Assembly from a list submitted by the Security Council. The intrusion of domestic politics and diplomatic horse-trading in the nomination and selection process has frequently resulted in the selection of candidates who were not the best qualified.¹⁴¹ Similar arbitrariness and uneven outcomes have resulted where mechanisms have received foreign judges and been staffed through secondment. Where mechanisms have been created under the auspices of the United Nations, or a regional inter-governmental body (as with the Kosovo Specialist Chambers and Specialist Prosecutor’s Office, or the GIEI in

Mexico), it can be difficult for them to adapt flexible recruitment policies and avoid pitfalls of some international organizations' long-established appointment and recruitment processes.

With UN or EU pay scales, benefits, and tax advantages, mechanisms have attracted many good officials, but also internationals more interested in money than the mission. Meanwhile, such institutions as nongovernmental organizations or other transitional justice mechanisms (such as Sierra Leone's Truth and Reconciliation Commission) have been able to attract highly motivated, skilled international legal professionals with modest pay and benefits. Medical NGOs also regularly attract motivated doctors to serve in difficult locations, despite modest pay. Pay discrepancies between national and international officials within the same institutions can lead to significant resentment; in the DRC, government and civil society concerns about the prospect of a significant pay gap between international and national officials contributed to the defeat of proposed mixed chambers for grave crimes.

Where mechanisms have been backed by an international organization, but not been a formal part of it (CICIG in Guatemala or the SCSL in Sierra Leone), they have had greater flexibility to define the criteria by which international participants are recruited. Yet mechanisms such as the SCSL that have relied on voluntary contributions have also often had to accept in-kind contributions from states in the form of seconded personnel, with mixed results.

The extent to which a mechanism has fostered an environment conducive to capacity building has depended in large part on the international officials recruited, their open-mindedness, their willingness to learn from national colleagues about local legal practice and culture, their willingness to be respectful, and their skill and experience in explaining legal or practical concepts. This underscores the importance of the recruitment process for the selection of international participants.

Lessons and Considerations

Form of International Participation

1. **The reasons for international involvement in the mechanism's operation should determine the extent of international participation.** These reasons should align with decisions made about the mechanism's purpose and its relationship to the domestic system. (See II.A. and II.B.) Where insecurity,

a lack of domestic political will, a high degree of societal polarization, and/or the devastation of a country's justice sector and infrastructure suggest need of more external elements in the mechanism's design, countries will usually experience a greater need for international involvement. It would have been difficult to conceive of credible mechanisms without international participation for the former Yugoslavia while the war was still underway, or in immediate postwar Rwanda or Sierra Leone. Where there is a high degree of domestic capacity and political will, as in post-junta Argentina or Senegal, there may be no need for international participation. At the Extraordinary African Chambers, international judges were only included due to a ruling from the ECOWAS Court requiring that the EAC not be wholly a component of the Senegalese justice system.

2. **Consider changing what form international participation takes over time.** The conditions that lead to a need for international participation may change, thus there should be allowance for changing its form to meet new realities over time and possibly phasing it out altogether. The ICTY, SCSL, and other heavily international courts arguably could have transitioned to management by nationals from the affected countries as wars ended and domestic capacities accrued. Perhaps the greatest innovation of the Bosnian model was its preplanned phase-out of international judges, prosecutors, and defense support, ultimately transitioning to an all-domestic mechanism. In Bosnia, the phase-out was planned according to a timeline, which may have encouraged political attacks by politicians opposed to the court. A phased approach to withdrawing international participation could be pegged to justice reform benchmarks; this could create incentives for a government to implement reforms and provide greater integration between the effort to achieve accountability for grave crimes and general rule-of-law development.
3. **Consider whether mentorship-only models may obviate the need for direct international involvement.** There may be constitutional or statutory restrictions on involving international judges and officials directly in a domestic justice system. Even if legally possible, in settings where there is pronounced sensitivity about foreign influence (as in the DRC), any direct inclusion of internationals may be discrediting and/or politically impossible. And if one of the mechanism's aims is to develop domestic capacity (as with CICIG in Guatemala), under some circumstances it may be preferable to use a lighter approach anyway and establish a model whereby internationals work alongside but are not officials of the system in question.

4. **If international prosecutors are directly or indirectly involved in supporting cases, then there should be provision for international support for defense teams as well as any victim representatives.** Especially where local defense capacities are very low, as was the case in East Timor, international support for the defense is vital to upholding fair trial rights. Establishing rights-of-audience for foreign lawyers in domestic courts may be challenging and require changes to court rules, the agreement of the local bar association, or a legislative amendment.¹⁴²

Qualifications

5. **International participants' motivations and attitude are factors at least as important to their value as their expertise and experience.** International judges and officials can make invaluable contributions to the success of a mechanism when they do the following: participate because they believe in the mission; treat their national colleagues with respect; are willing to learn from national counterparts about local context and applicable law and practice; embrace opportunities to share their own expertise without condescension; and are present long enough to learn the context and make real contributions. By contrast, the benefits of international involvement are diminished or nullified when officials are motivated primarily by high, tax-free pay, generous per diems, or lives of privilege and lack of personal accountability in “exotic” locations; when they treat national counterparts with arrogance; when they refuse to learn about applicable laws and legal customs; when they show little commitment to the job; or when they are on short-term contracts and never get their bearings. Every mechanism with international participation has attracted judges and officials who fall along a spectrum between these two extremes. However, the balance of this mix has varied depending on the selection process, and designers of new mechanisms should aim for significant improvement over past practice. (See lessons under *Selection process* and *Accountability*, below.)
6. **International officials must themselves have outstanding records on ethics issues.** Prospective judges should have a consistent record of independence, impartiality, integrity, propriety, equality, and diligence—consistent with the Bangalore Principles of Judicial Conduct¹⁴³—in their home jurisdictions and any previous national assignments. Judges and lawyers should have clean ethics records with all relevant oversight bodies in their home jurisdictions.

7. **Internationals must be familiar with the legal system in which they will be working.** When this is not the case, as in East Timor and Kosovo, it causes difficulties. For example, common law judges who don't understand victim representation, or civil law investigative judges who don't understand plea bargaining, will struggle to add value to mechanisms where these are legal features. In Bosnia, where adversarial elements were introduced into a civil law criminal code, international prosecutors were largely from common law backgrounds, while international judges were largely from civil law backgrounds, leading to difficulties in harmonizing practice before the BiH WCC.

8. **Internationals should have strong substantive expertise and experience commensurate to the roles they will fill.** In the case of the ad hoc tribunals, judges must be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”¹⁴⁴ In addition to this, in the overall composition of the chambers, “due account” must be taken of “the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.”¹⁴⁵ These requirements are replicated in the SCSL Statute.¹⁴⁶ Practical skill and experience in legal drafting and case management is also important. In Bosnia, judges and prosecutors were required to have eight years' experience in dealing with complex criminal matters. To avoid a source of resentment in mixed institutions, such requirements should never be lower for international participants than for domestic counterparts.

9. **Where possible, internationals should be fluent in the working language of national colleagues.** Working through interpreters and translators is costly, time-consuming, prone to error and misunderstanding, and less conducive to the building of collegial relationships that foster trust and capacity building. There are large pools of judges and lawyers experienced in international criminal law who speak English, French, and Spanish, and where one of these is the mechanism's working language, fluency in that language should be an absolute requirement. In some places, such as East Timor or Kosovo, it may be obvious that the pool of internationals who speak the local language is insufficiently large to make fluency a requirement. And in other places (for example, where Russian and Arabic are spoken), an assessment may be necessary to determine whether there are enough internationals who are language proficient and meet the mechanism's substantive needs.

Selection Process

10. The recruitment of international judges and staff should be transparent.

Foreign judges at the BiH WCC were initially seconded by governments, which resulted in some judges lacking in experience, expertise, and commitment.¹⁴⁷ Later, a newly established High Judicial and Prosecutorial Council, responsible for selecting national judges and prosecutors, took over the process for choosing international judges and prosecutors in accordance with criteria applied to their national counterparts. The involvement of a domestic institution in the selection of international judges or other officials becomes problematic, however, where the institution is politicized; this has been the experience in Cambodia, where a politicized Supreme Council of the Magistracy was granted a role in formally approving UN-appointed judges to the ECCC.

11. The process should emphasize gender equity and gender competence.

The Rome Statute contains useful provisions on judicial selection and appointment. In addition to the ad hoc tribunals' requirement for due regard to the representation of the principal legal systems of the world, the Rome Statute requires "equitable geographical representation" and a "fair representation of female and male judges."¹⁴⁸ Experience demonstrates that it is essential that fair gender representation among judicial officers (and staff) be written into founding legislation. These legal provisions are essential to ensuring equal or equitable representation, and in providing a basis for accountability where judicial appointing authorities fail to meet these standards. In the case of mechanisms backed by the UN, there is also a long-stated UN goal of achieving a 50–50 gender distribution at all levels of the UN, with particular attention to those at decision-making levels (including judicial officers).¹⁴⁹ In addition to equality arguments, and improved decision-making through consideration of different perspectives, there is some evidence to suggest that the gradual shift of earlier international criminal justice institutions toward taking rape and other sexual crimes seriously, and investigating them zealously, can be traced to the participation of women in the ad hoc tribunals as investigators, researchers, judges, legal advisors, and prosecutors.¹⁵⁰

12. Avoid exorbitant pay and benefits for international judges and staff.

Unless the basis of authority binds the mechanism to an existing UN or other system characterized by high pay, mechanisms should be designed with the flexibility to establish more reasonable rates and benefits. A needs-assessment may be required to establish what appropriate pay and benefits are required. High-risk, nonfamily posts may require higher pay to recruit qualified officials

for an extended period. This has been a challenge for the SCC in the CAR. Where high pay is necessary, the importance of targeted advertising to experts in the field (rather than relying on standard UN or other listings) becomes more important in order to attract well-qualified internationals. (See also II.D. BASIS OF AUTHORITY.)

13. **Contracts for foreign judges and officials should be a minimum of two years in duration.** The short-term nature of international-expert contracts in East Timor, Kosovo, and the DRC meant that international experts were frequently more of a burden than a help. And where international judges stay for only one year, as some did in Bosnia, they may be unable to sit on cases that may not conclude before their contracts are up. Longer contracts may not be possible where a leading or partnering international organization has problematic internal rules or procedures, or there are funding bottlenecks that prevent the issuance of contracts of longer duration. However, even under such circumstances, candidates who express a willingness to extend their contracts should receive preference over those who do not.

Accountability

14. **Mechanisms should have strong codes of conduct and enforcement procedures in place for international judges and staff from the beginning, with required trainings for new officials.** At the time when a senior international investigator at the SCSL was accused of raping a child, almost two years after the SCSL launched operations, there was still no staff code of conduct in place; the allegations and resulting criminal trial divided staff and damaged the court's reputation.¹⁵¹ Such incidents are less likely to occur where there are strong codes of conduct that are communicated to staff and there are enforcement mechanisms in place. Mechanisms with defined procedures can more adeptly react when allegations arise. Enforceable codes of conduct signal to international judges and staff that there is still accountability for personal behavior, even if there are agreements in place granting them legal privileges and immunities. (See also II.I. OVERSIGHT.)

Integration Process

15. **In a mechanism embedded in the national justice system, the roles and responsibilities of international judges and staff should be clear from the outset.** To avoid confusion, it must be clear when internationals work within

the hierarchies of the domestic system, and when (if at all) they answer to an international Registry or administrators.

16. **Where applicable, there should be an expectation that international judges and staff will participate in trainings by national counterparts on the domestic justice system.** This has the substantive benefit of improving their grasp of applicable criminal procedure and local legal culture. Furthermore, it demonstrates respect for local colleagues.
17. **There should be a system for national and international colleagues to collaborate in identifying what trainings and resources are most needed to build national capacity.** New accountability mechanisms may be inundated with offers of trainings from NGOs, governments, and academic institutions. However, often such short-term trainings are repetitive, too abstract, and distract officials from the cases that need their attention. A process that gives national officials a full say in choosing only the most relevant training or mentorship offers, with advice from international officials, can make better use of resources and facilitate an atmosphere of collegiality.

Key Questions to Determine the Integration of International Judges and Staff

- *In light of political circumstances and domestic capacity, which positions need to be filled by internationals, and why?*
- *If the circumstances requiring international participation may change over time, how might its scale and form change over time to adapt to new circumstances?*
- *Are there legal restrictions on the involvement of internationals in the domestic system, such that a model with internationals in advisory roles makes sense?*
- *Even if allowed under the law, are there particular societal sensitivities about direct foreign involvement in the justice sector, such that a mentorship model might be preferable?*
- *If international involvement in prosecutions is foreseen, to ensure fairness, how will defense and victim representation be granted the same opportunity?*
- *How will the recruitment process be structured to favor open-minded and highly motivated candidates?*

- *For the number and types of internationals sought, is there a pool of eligible candidates large enough that speak the mechanism's working language, such that fluency can be required of candidates?*
 - *What steps are possible to ensure a transparent, merit-based recruitment process? Is the domestic procedure for judicial appointments independent and capable enough to take on the task?*
 - *What pay and benefit levels are absolutely necessary to attract qualified international participants, without attracting those mainly interested in high salaries?*
 - *Has the recruitment process been designed to achieve gender balance among international officials?*
 - *Who will be responsible for ensuring that enforceable codes of conduct are in place before international participants are recruited?*
 - *Where a separate Registry or international administration is foreseen, is it clear when international participants answer to it and when they answer to hierarchies within the justice system they are working?*
 - *What procedures will exist that include national staff to screen external offers of training and prioritize capacity-building needs?*
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H. Financing

Can the mechanism be funded from the domestic budget, or should it rely on the international community? Are there disadvantages to receiving reliable budget appropriations from the state or assessed funding from an international institution? What are the implications of relying on voluntary funding? What are the implications of leaving some mechanism functions outside of the mechanism's core budget?

Experiences to Date

Funding for accountability mechanisms for grave crimes have been fixed (or "secured"), voluntary, or some combination of these. The model of a mechanism's financial support has been heavily influenced by decisions about its relationship to the domestic system (see II.B.) and its basis of authority (see II.D.). In turn, the funding model used has had implications for mechanism structures (see II.F.) and how, where applicable, international judges and staff have been recruited (see II.G.).

In a domestic system, fixed or secured funding derives from the national budgeting process. This has been the case in Argentina, for example. Colombia also funds grave crimes proceedings from its national budget, which has also been used to provide a majority of the compensation provided to victims (although under the Justice and Peace Law, this should be paid from perpetrators' assets). For international or mixed mechanisms, "fixed funding" refers to assessed contributions from the UN or another international or regional organization's member states. For example, both the ICTY and ICTR had a secure source of funding through the expenses of the UN in accordance with Article 17 of the UN Charter (although both also came to rely on voluntary funds for some expenses).

Mechanisms have relied on voluntary funding when there has been no fixed source of funding, though there may be particular interested parties (states or international organizations) who have expressed a willingness to contribute funding to the mechanism. The SCSL was initially funded through voluntary contributions from governments. The ECCC, the EAC, the CICIG, and the SCC for the CAR have likewise relied on voluntary contributions of the international community.

Some domestic mechanisms have also received external, voluntary contributions. Most of the Congolese justice system, including the elements involved in grave crimes cases, has relied on donor support. In Uganda, the ICD has received support from countries including the United States, Denmark, Ireland, The Netherlands, Austria, Norway, and Sweden. In Colombia, the U.S. Department of Justice and the Inter-American Development Bank have funded significant justice-sector-related projects.

In some places, the balance of funding has changed over time. Quite early on, the General Assembly established a "Voluntary Trust Fund" for aspects of the ICTR's work. In Sierra Leone, shortfalls in voluntary contributions required the Special Court to seek and receive UN subvention grants in 2004, 2011, and 2012. In East Timor, the United Nations Mission of Support to East Timor (UNMISSET) funded both the Special Crimes Unit and the Special Panels through both assessed and voluntary contributions, whereas the later-created Special Crimes Investigation Team (SCIT) was funded through assessed contributions.

In relation to the SCSL, private foundations and international agencies have played a significant role in funding "non-core functions," such as outreach and judicial trainings. For several years, the Open Society Foundations was the primary funder of a mobile court project for gender justice in the DRC.

Lessons and Considerations

1. **Advantages and disadvantages to fixed and voluntary funding should be considered in light of the specific context.** Some previous assessments of mechanism design and operation have recommended assessed funding models and avoidance of voluntary funding.¹⁵² However, even if the advantages of fixed funding generally outweigh the disadvantages, the totality of experiences to date suggests that the question should be examined on a case-by-case basis.
 - a. **Advantages of fixed-only funding and disadvantages of voluntary funding:**
 - i. A secure stream of funding provides a level of certainty for the mechanism, which aids operators in planning. The uncertainty of voluntary funding and the vagaries of different donor budget and planning cycles can make planning more difficult.
 - ii. Gaps in funding can delay proceedings and lead to other inefficiencies, including difficulties in recruiting and retaining staff.
 - iii. Voluntary funding requires senior mechanism administrators to invest significant time in fundraising, with associated support and travel expenses.
 - iv. Fixed domestic funding can underscore national ownership over a mechanism, and fixed international funding (such as assessed contributions from UN member states) creates political distance between financial backers and judicial operators. By contrast, reliance on foreign voluntary donors (for example, U.S. support to the Iraq High Tribunal) can harm a mechanism's legitimacy.
 - b. **Disadvantages of fixed-only funding and advantages of voluntary funding:**
 - i. A mechanism reliant on a state's regular budget can be more prone to political pressure. Where states have demonstrated a pattern of executive interference in the judiciary, and/or a strong desire for one-sided justice (as in Bangladesh or the proposed hybrid court for Darfur), domestic fixed funding can damage the mechanism's real or perceived independence and legitimacy. By contrast, external voluntary funding for mechanisms in polarized societies may lend greater legitimacy to mechanisms (such as those in Bosnia and Kosovo) than they would have if primarily funded through the budgets of states strongly

associated with one narrative of contentious events (as in Croatia and Serbia).

- ii. Fixed funding from the United Nations and other international or regional bodies comes with significant bureaucracy. Attendant procedures and regulations exist to ensure that mechanisms operate in accordance with such virtues as transparency, fairness, and financial responsibility. However, in practice, requirements pertaining to recruitment, pay and benefits, and oversight can be unwieldy, create perverse incentives in hiring, be costly to implement, and significantly prolong the time needed for mechanism establishment. (See also II.D. BASIS OF AUTHORITY, and II.G. INTEGRATION OF INTERNATIONAL JUDGES and STAFF.)

2. **If the mechanism is funded through a mix of fixed and voluntary contributions, leaving important aspects of the mandate outside of “core activities” can lead to non-implementation or delay.** Multiple mechanisms have relegated aspects of their work, including outreach, victim representation, reparations, and legacy to separate “non-core,” voluntary funds. With regard to outreach, this has led to damaging delays in the ability of mechanisms to generate understanding of their mandates, as has happened with the ICTY, ICTR, BiH WCC, and ECCC. Victim representation can make a mechanism’s proceedings more relevant to affected individuals and communities; but apart from the STL and ICC, mechanisms have generally not foreseen legal aid for victim representation. In Bosnia, victim representation is foreseen under the criminal procedure code, but funding constraints have led to non-implementation before the War Crimes Chamber. There has been a similar problem in Colombia, where broad victim participation rights are constrained by inadequate funding. In Cambodia, the ECCC relied on NGO projects to fund victim representation. Reparations are often very important to affected communities and could increase prospects for the mechanism’s proceedings to contribute to reconciliation; however, in many situations, funds for reparations are sparse. Provisions for reparations under Congolese law have never received adequate funding; any reparations awarded have usually not been implemented.¹⁵³ This has led some victims to question the utility of the criminal process. As of October 2017, the reparations trust fund established for the EAC was similarly in danger of disappointing many victims of convicted former Chadian President Hissène Habré. For temporary mechanisms, legacy too “should be explicitly mandated and receive support from the core budget.”¹⁵⁴

3. **Whether funded through fixed or voluntary contributions, funders should ensure balance in support for different parts of the judicial process.** At the outset of serious crimes proceedings in East Timor, the UN provided extensive funding for investigations and prosecutions, with only about 10 percent of that amount for adjudication and none at all for defense. This resulted in abuses of fair trial rights and extensive delay and inefficiency.
 4. **Mechanisms that don't meet international standards will struggle to raise voluntary funds.** Mechanisms that fail to meet international standards in key areas, including judicial independence and fair trial rights, will find it difficult to attract voluntary contributions. Continuing concerns about Cambodian government meddling in the proceedings of the ECCC have contributed to that mechanism's chronic difficulties in raising donor funds. The ICTB has not had international support due to violations of fair trial standards and perceptions that it is run, in part, to serve a political agenda. Similarly, the European Union, many European states, and many civil society organizations refuse to assist a mechanism with the death penalty. This left the IHT overwhelmingly dependent on the United States for financial and other forms of support.
 5. **Where in-country mechanisms receive international assistance, whether assessed or voluntary, consider planning for a shift in funding sources over time, possibly tied to a phase-out of the involvement of international judges and staff (where applicable).** Building in a transition from international to national funding can help increase local ownership, ensure integration of effort with general justice-sector development, enhance confidence in the sustainability of the justice effort in countries where reforms are taking hold, and ease donor concerns about open-ended commitments. However, there is also potential risk. If national authorities agree to take over funding but then do not, the mechanism's continued proceedings could be imperiled.
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Key Questions to Determine Financing

- *In determining how the mechanism should be financed, have all major stakeholders been consulted, including victims and others in affected communities?*
- *For mechanisms integrated into national justice systems, does the state have the will and means to provide adequate funding?*

- *In such contexts, is there a danger that the state might use financing to inappropriately influence prosecutorial and judicial decisions?*
 - *Would state financing of the mechanism enhance or detract from its perceived legitimacy among affected communities?*
 - *If the court is authorized or co-authorized by an international or regional body, is there support for a stream of assessed funding to last for the expected duration of the mechanism’s mandate?*
 - *If so, would funding from the international or regional body in question enhance or detract from the mechanism’s perceived legitimacy among affected communities?*
 - *If fixed funding from an international or regional body is contemplated, what rules and regulations would flow from the decision, including with regard to recruitment, remuneration, procurement, and oversight? Where such rules and regulations would have undesirable implications for such things as the quality of international officials recruited, the time it would take to establish the mechanism, or overall expense, would it be possible to negotiate changes that mitigate these effects?*
 - *Where voluntary funding is contemplated, are a sufficient number of states, organizations, and possibly private donors interested and likely to sustain interest for the years it will take for the mechanism to complete its mandate?*
 - *Would contributions from expected donors more likely enhance or detract from the mechanism’s legitimacy in the eyes of affected communities?*
 - *Are there existing rule-of-law development projects in the affected country that could be adapted to support aspects of the mechanism’s operations?*
 - *How are possible deficiencies in the mechanism’s adherence to international standards likely to affect donor interest, and can these deficiencies be avoided or remediated?*
 - *Are all aspects of the mechanism’s mandate considered “core”? If not, what are the implications for the mechanism’s success if “non-core” aspects are not funded or underfunded?*
 - *Where a mechanism is externally funded, could it be possible to transition to domestic funding for all or part of the budget over time without compromising its mandate or operations?*
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I. Oversight

What means of formal oversight should exist, including processes for the appointment and removal of judges and prosecutors; ethics guidelines and processes to ensure their enforcement; and structures to hold the mechanism accountable for nonjudicial decisions and management of its budget? What means of informal oversight are needed to hold the mechanism accountable for fulfilling its mandate fairly and effectively, including court monitoring, civil society advocacy, and media coverage?

Experiences to Date

Formal Oversight

The means of mechanism oversight has been heavily determined by the mechanism's relationships to the domestic system (see II.B.), basis of authority (see II.D.), and structure (see II.F.). Oversight functions may be distributed across the different offices and agencies responsible for different parts of the domestic judicial chain (as in Argentina and Uganda); special mechanisms within the domestic system may have some extraordinary oversight elements (as in Bosnia and, to a lesser extent, at the EAC), or be much more consolidated in the case of extraordinary, stand-alone international mechanisms. Within this last group, mechanism oversight has been defined in primary instruments and might, in part, rely on existing oversight agencies and procedures of the international or regional authorizing body, including the United Nations (for the ICTY and ICTR),¹⁵⁵ the Inter-American Commission on Human Rights (for the GIEI), and the AU (for the proposed criminal chamber at the ACJHR).

Some UN-backed mechanisms have opted-in to some UN oversight functions, as was the case at the SCSL. Although the SCSL was not a UN body, it followed UN accounting practices by outsourcing its internal audit to the United Nations Office for Internal Oversight Services; and its external audit to the United Nations Board of Auditors. Both internal and external audits were conducted according to the same practices as would apply to audit a UN institution.¹⁵⁶

Additionally, at the SCSL, unlike the ECCC that came before it, a management committee was created, comprised of representatives of donor states, Sierra Leone's government, and the UN Secretary-General.¹⁵⁷ Its functions included oversight of the court's annual budget and other financial matters, and the provision of advice and policy direction on nonjudicial aspects of the court's operations, including questions

of efficiency.¹⁵⁸ The committee made annual visits to the court. This management committee model has been adapted by subsequent mechanisms, including the STL.

In Uganda, a “Court Users Committee” foreseen for any specialized court in the country, provides another model of formal public transparency. Under the ICD’s practice directions, the committee is to include key official stakeholders in the court, as well as members of the public, and is granted an advisory role. However, funding constraints have prevented the committee from convening. The Kosovo Specialist Chambers have a novel “Ombudspersons Office” within the Registry. It has a mandate to receive and investigate complaints with regard to the fundamental rights and freedoms of those interacting with the mechanism.

In Cambodia, oversight functions at the ECCC have been bifurcated: domestic and UN procedures, for Cambodian and international officials and staff, respectively. And in response to persistent reports of corruption, the UN and Cambodian government agreed to the creation of an independent counselor to investigate allegations, although reports from that office have never been made public. In Guatemala, CICIG has had little formal external oversight, neither from the United Nations, nor a management committee; it has relied on internal procedures and the performance of one powerful commissioner.¹⁵⁹

For situations falling under the potential jurisdiction of the ICC, the principle of complementarity provides another formal, external source of oversight. Many countries under “preliminary examination” by the ICC’s Office of the Prosecutor wish to avoid cases being taken to The Hague; these include such states as Colombia or the United Kingdom (in relation to alleged crimes in Iraq), and even states (such as Israel) that are not party to the Rome Statute but whose nationals could be investigated for alleged crimes committed on the territory of a state party. These states must show that they are delivering on their obligations to genuinely investigate and prosecute crimes under international law in order to prevent the OTP from opening a full investigation. And where investigations are already open, states can face ICC demands for arrest of senior figures if they are not genuinely tried domestically, as has happened in Côte d’Ivoire.

Informal Oversight

Beyond formal oversight mechanisms, informal oversight of accountability mechanisms has taken various forms. States, international organizations, civil society organizations, and the media have all been important actors in this regard.

Donors to mechanisms have provided some measure of accountability for budget and performance, even where they lack a formal role in a management committee. For example, in Uganda, justice-sector donors formed the Development Partners Group (DPG), a body that liaises with the national justice-sector coordination mechanism. Through the DPG, donors have coordinated in the prioritization of assistance to the ICD, allowing them to set some conditions for how their aid is spent.¹⁶⁰

Trial monitoring and the monitoring of institutional developments has been another key source of informal oversight. The prospect of having shortcomings in operations or proceedings exposed can provide a powerful incentive for mechanism officials to keep operations on track. Such exposure can also serve to trigger action by formal oversight bodies. The OSCE has monitored domestic proceedings in Bosnia, Kosovo, and Serbia. In some locations, international nongovernmental organizations or academic institutions have monitored grave crimes trials (for example, *Avocats San Frontières* in the DRC, the Open Society Justice Initiative in Cambodia and Guatemala, and the University of California, Berkeley's War Crimes Studies Center in Cambodia and Sierra Leone). Local NGOs have also played important roles in trial monitoring in such places as Serbia, Kosovo, Senegal, and Sierra Leone. Their ability to play this role depends in part on their capacity, which ranges from quite high (as in Serbia and Kenya) to very low, especially where conflict is ongoing or has just ended (as in East Timor and the CAR). It can be more difficult for local NGOs to act as effective forces for oversight in countries with highly polarized societies, as in Syria, Côte d'Ivoire, or Bosnia, or where state repression limits their freedom to operate, as in Sudan or Burundi, and to lesser extents in such places as Cambodia and Mexico.

Finally, journalists have provided a vital source of informal oversight by questioning mechanisms' performance and exposing injustices, politicization, corruption, and inefficiency. The degree to which they are able to perform this function has depended on general levels of media capacity and freedom in the affected country.

Lessons and Considerations

Formal Oversight

1. **Ensure that all mechanism officials are bound by enforceable codes of ethics.** Whether through well-functioning offices of a country's ordinary justice system, ad hoc documents and structures, or long-established policies and agencies of an international or regional organization, every judge and staff

member at an accountability mechanism for grave crimes should be bound by a code of ethics enforced by capable, independent officials. In no case should a mechanism fail to have such codes in place at the outset of operations, as happened at the SCSL. (See also II.G. INTEGRATION OF INTERNATIONAL JUDGES AND STAFF.) The issue of enforceable codes of conduct for judges is delicate, with two scenarios that should be avoided: judges with sole discretion to oversee “their own,” and judges responding to an oversight body that may have (or be perceived to have) a political agenda or bias.

2. **Have clear and strong means of external review of budget, whether through capable and independent national auditing offices, existing bodies of international organizations, or newly created special structures.** The absence of clear lines of fiscal accountability for the domestic aspects of the ECCC’s operations embroiled the court in corruption scandals, whereas in Sierra Leone—a country, like Cambodia, with a history of extensive official corruption—the SCSL made use of UN internal and external financial auditing procedures and avoided financial scandal.
3. **Avoid shared oversight where this could result in obstruction of the mechanism’s work.** In some situations, shared forms of oversight can work. For example, at the EAC, all senior officials (except the presiding judges on the Trials and Appeals Chambers) were Senegalese and nominated by Senegal, but formally appointed by the AU. This presented no difficulties because both parties supported the EAC’s mission. In Cambodia, however, a similar arrangement involving a UN nomination of an international co-investigating judge, requiring only formal approval by Cambodia, broke down and triggered diplomatic tension when Cambodia refused to grant its assent.
4. **In politicized systems, consider external, specialized, more transparent processes for appointments and removals.** Mechanisms lose credibility when they depend on officials from within politicized justice systems. For example, in Uganda, state prosecutors have not scrutinized serious allegations of war crimes perpetrated by the national army, threatening to make the ICD a mechanism destined to apply one-sided justice. Similar dynamics have reduced the credibility of grave crimes proceedings in Côte d’Ivoire and Bangladesh, and prevented them altogether in Kenya and Liberia. In Mexico, where federal prosecutors similarly refused to investigate indications of military and federal police involvement in a large-scale atrocity, it was left to internationally appointed experts with the GIEI to develop these leads.

5. **Require mechanism administrators to report regularly to an oversight body.** In a domestic system, this may occur in piecemeal fashion, with judges, prosecutors, and police investigators reporting to respective management officials within the system. Elsewhere, there can be a requirement of regular reports to standing international organizations or ad hoc structures. For example, IIIM for Syria is required to report to the UN General Assembly twice yearly, the SCSL registrar reported monthly to the court's management committee, the STL's president reports annually to the UN Secretary-General and the government of Lebanon, and the proposed criminal chamber of the ACJHR would be required to submit an annual activity report to the AU Assembly of Heads of State and Government as well as financial reports to the AU Executive Council.

Informal Oversight

6. **Ensure that transparency is a key value for the mechanism and that it is expressed in founding documents.** Informal oversight depends on information, and while the mechanism will need to keep some secrets (on such matters as judicial deliberations and operational witness protection), it should be designed to accommodate requests for information about its proceedings and operations, including in the areas of efficiency, finances, and ethics. Founding documents should emphasize an ethos of transparency.
7. **Donors to a mechanism should coordinate their activities to the extent possible.** Even if this is not through a formal oversight structure, such as a management committee, donor coordination not only reduces gaps and duplication in support, but allows donors to act as an external source of accountability for the mechanism's use of their funds. Donor coordination in DRC has been weak, whereas in Uganda it has been effective.
8. **Identify potential international organizations that could monitor proceedings.** An international organization that has no role in the mechanism's administration but is operating in the same country can play a valuable role in monitoring operations and proceedings. This has been the case with OSCE monitoring of proceedings in the former Yugoslavia.
9. **Those who are supporting the creation of a new mechanism should help ensure that domestic civil society organizations and journalists have the freedom and resources to access the mechanism, to monitor its proceedings and operations, and to criticize it.** The ultimate utility of a

mechanism will depend on the credibility of its work. In turn, that credibility hinges on a mechanism's ability to withstand public scrutiny from civil society advocates and monitors, as well as journalists. Where necessary, states and international organizations should prioritize diplomatic interventions on behalf of civil society advocates and the media, and support their capacity to engage with the mechanism being created.

Key Questions to Determine Oversight

- *In determining means of mechanism oversight, have all major stakeholders been consulted, including victims and others in affected communities?*
- *Are there functioning oversight bodies for the justice system in the affected country, including for judges, prosecutors, defense and victim counsel, and civil servants?*
- *Are there strong and enforceable codes of ethics that can be referenced in founding documents, whether national or international in origin?*
- *Are there functioning domestic institutions available to oversee the mechanism's budget, or are there prospects for outsourcing this to an international or regional organization?*
- *Where shared roles in some or all oversight functions are contemplated, are all parties supportive of the mechanism, and is that support likely to continue no matter what judicial decisions it makes? Are there scenarios that could lead to deadlock or the abuse of oversight authority to obstruct implementation of the mechanism's mandate?*
- *Would use of a particular existing mechanism for the appointment and removal of officials enhance or detract from the mechanism's credibility within the affected population? If so, what changes could mitigate or avoid this risk?*
- *Are mechanism administrators required to report regularly on judicial proceedings, operations, and finances to an oversight body?*
- *How can the value of transparency be reflected in the mechanism's founding documents?*
- *Where a mechanism receives donor support, are donors coordinating to ensure enhanced accountability for the use of their funds?*
- *Are there national or international organizations working in the affected country that could engage in independent monitoring of the mechanism's proceedings and operations?*

- Do civil society organizations and journalists have the freedom and capacity to engage with, monitor, and report on the mechanism's proceedings, operations, and finances? If not, what can be done to support them?
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Notes

13. The source documents for current, past, and emerging mechanisms are generally the legislative instruments establishing them (and in some cases, subsidiary instruments). In the case of mechanisms at the domestic end of the spectrum, the relevant legislative instruments may only add substantive jurisdiction to already-existing courts. In some cases, the mandate may even require a constitutional amendment (as was under discussion for some time in Kenya, for example).
14. This is what the OHCHR's *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, HR/PUB/O8/2 (New York and Geneva, 2008) refers to as its "core mandate" (6). Whether the mechanism's legacy forms part of its core mandate, the publication notes, "is a matter of some controversy" (7).
15. The United Nations defines "legacy," in the context of international criminal justice, as the "lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity." OHCHR, *Rule of Law Tools (Hybrid Courts)*, 4–5.
16. Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 2011, 5.
17. As noted in OHCHR's *Rule of Law Tools (Hybrid Courts)*, "Ascribing goals of achieving a sustainable peace, or reconciliation, to criminal trials should [...] be avoided. These are very complex objectives that require an approach that goes beyond criminal prosecutions" (6n10).
18. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 46.
19. UNSC Res 1272 (1999) UN Doc S/RES/1272.
20. The International Crimes (Tribunals) Act, Act No. XIX of 1973; The International Crimes (Tribunals) (Amendment) Act, July 14, 2009 (Act No. LV of 2009), available at: [parliament.gov.bd/14%20July%202009\(5699-5701\)\(2\).pdf](http://parliament.gov.bd/14%20July%202009(5699-5701)(2).pdf).
21. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Preamble. See also UNGA Res. 57/228, December 18, 2002.
22. Few mechanisms mention the concept of "truth" in their founding documentation, and those that do are generally in such places as Cambodia and Lebanon, which have inquisitorial legal systems. The ECCC mentions "truth" several times in its Internal Rules (a subsidiary instrument) though not in its founding instruments (agreement or law). See ECCC *Internal Rules*, Rule 55.5, "In the conduct of judicial investigations, the co-investigating judges may take any investigative action conducive to ascertaining the truth. ... They shall conduct their investigation impartially, whether the evidence

is inculpatory or exculpatory.” *Internal Rules* 60, 85, 87, and 91 also make significant mention of the truth as a guiding principle in the collection of evidence (in and out of court). Although beyond the scope of this handbook, the Rome Statute of the ICC (Article 54(1)(a); which reflects many inquisitorial law aspects) states that the prosecutor must (“shall”) “in order to establish the truth, extend the investigation to cover all facts and evidence ... [and] investigate incriminating and exonerating circumstances equally.” In terms of the evidence received by the court, Article 69.3 gives the court authority to “request the submission of evidence that it considers necessary for the determination of the truth” (all emphases added).

23. Constitutive Act of the African Union (Article 4 (h) and (j)).
24. Projet de loi modifiant et complétant la loi organique no. 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l’order judiciaire en matière de répression des crimes de génocide, des crimes contre l’humanité, et des crimes de guerre (bill dated May 2, 2014, and on file with author).
25. Civil Society Draft Bill for the Special Tribunal for Kenya (Explanatory Memorandum / Long Title), available at: iccnw.org/documents/Draft_Bill_for_the_Special_Tribunal_for_Kenya1.pdf.
26. Civil Society Draft Bill for the Special Tribunal for Kenya (Preamble), available at: iccnw.org/documents/Draft_Bill_for_the_Special_Tribunal_for_Kenya1.pdf.
27. See ICD website at judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html.
28. African Union, EX.CL/846(XXV) Annex 5, STC/Legal/Min/7(1) Rev. 1, May 15, 2014, Preamble, available at: iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf.
29. For detailed analysis of these issues, see Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012); William A. Schabas and Patricia M. Wald, “Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience,” *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 98 (March 31–April 3, 2004), 189–95.
30. The SCSL had a mandate limited to those bearing “greatest responsibility” for crimes perpetrated on the territory of Sierra Leone. See Eric Witte, “Beyond ‘Peace vs. Justice’: Understanding the Relationship Between DDR Programs and the Prosecution of International Crimes,” in *Disarming the Past: Transitional Justice and Ex-combatants*, ed. Cutter Patel, De Greiff, and Waldorf (ICTJ and Social Science Research Council, 2009), 99–100 n60.
31. A government’s refusal to pursue particular perpetrators or parties to a conflict will often not be overcome by legal drafting; this is more likely to be tackled via political wrangling or operational decisions (for example, prosecutorial strategy). However, legal language can provide domestic and international stakeholders with additional tools to advocate for the mechanism’s impartial operation.
32. Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms,” *Law and Contemporary Problems* 59 (1996): 127.
33. If Chapter VII of the UN Charter is the source of power used to establish the mechanism, then sustainable (national, regional, international) peace will naturally inform the content of the mechanism’s purpose. However, the question of whether international criminal prosecutions deter the future commission of atrocities remains open and, as such, goals related to peace (expressed as general and/or specific deterrence) should be conservatively stated. See David Wippman, “Atrocities,

- Deterrence, and the Limits of International Justice,” *Fordham International Law Review* 23: 488. For a recent, more comprehensive examination of questions around the deterrent effect of the prosecution of international crimes, see Jennifer Schense and Linda Carter, eds., “Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals,” International Nuremberg Principles Academy, 2016, available at: nurembergacademy.org/fileadmin/media/pdf/publications/The_Deterrent_Effect_of_International_Criminal_Tribunals_.pdf.
34. The UN Office of the High Commissioner for Human Rights advises against including these purposes altogether. “Ascribing goals of achieving a sustainable peace, or reconciliation, to criminal trials should [...] be avoided. These are very complex objectives that require an approach that goes beyond criminal prosecutions.” OHCHR, *Rule of Law Tools (Hybrid Courts)*, 6 n10.
 35. See Elena Baylis, “Function and Dysfunction in Post-Conflict Justice Networks and Communities,” *Vanderbilt Journal of Transnational Law* 47, no. 625 (2014).
 36. For a useful discussion of these issues, see the publication of the OHCHR, *Rule of Law Tools (Hybrid Courts)*, available at: ohchr.org/Documents/Publications/HybridCourts.pdf.
 37. See Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011. (Also available in French and Spanish.)
 38. While Rwanda had abolished the death penalty prior to the ICTR prosecutor’s first attempts to refer cases to Rwanda, a number of significant legislative amendments were made following the first round of unsuccessful attempts, including the passing of legislation to do the following: abolish solitary confinement; afford immunity and other protections to defense teams and witnesses; provide for alternatives to live testimony, in which witnesses were located outside of Rwanda; and review and amend the so-called “Genocide Ideology” law. See *Complementarity in Action: Lessons Learned from the ICTR Prosecutor’s Referral of International Criminal Cases to National Jurisdictions for Trial*, February 2015, paras. 50–63, available at: unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf.
 39. For a definition of “hybrid tribunal,” see *Rule-of-Law Tools (Hybrid Courts)*, available at: refworld.org/docid/47ea6fbb2.html. The definition used is as follows: “Courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred” (1). See also Sarah Williams, *Hybrid and Internationalised Tribunals: Selected Jurisdictional Issues* (Oxford: Hart Publishing, 2012), 249: “There is no comprehensive definition of a hybrid or internationalized tribunal. There do appear to be several defining features: (1) the tribunal performs a **criminal judicial function**; (2) the **temporary or transitional nature** of such institutions (or at least the international component); (3) there must be at least **the possibility** of the participation of international judges sitting alongside national judges and **for international involvement** in other organs of the tribunal; (4) the provision of international assistance in the financing of the tribunal, although this on its own will not internationalize an otherwise national institution; (5) a **mix of international and national elements in the material jurisdiction** of the tribunals, or at least that **crimes within the jurisdiction are of concern to the international community**; and (6) the **involvement of a party other than the affected state**, such as the United Nations, a regional organization or another state(s)” (emphases added).

40. Coalition Provisional Authority Number 48, entitled, *Delegation of Authority Regarding an Iraqi Special Tribunal*, December 10, 2003, available at: iraqcoalition.org/regulations/.
41. Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, 2010, 13, available at: amnesty.eu/content/assets/doc2010/croatia_behindwallofsilence.pdf.
42. See Human Rights Watch, *The Long Arms of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, September 2014, available at: hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and. The report notes that, in addition to France, Germany, and the Netherlands (whose experiences are explored in the report), Belgium, Canada, Croatia, Denmark, Norway, South Africa, Sweden, Switzerland, the United Kingdom, and the United States have specialized war crimes units (2n1).
43. See ICCPR, Article 14.1, generally.
44. Article 14.2.
45. Minimum guarantees are
- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
 - (g) not to be compelled to testify against himself or to confess guilt. (Article 14.3)
46. Article 14.5.
47. “Double jeopardy” also known by the French *autrefois acquit* is a fair trial guarantee which—as a legal matter—protects an individual from being twice tried for the same offense.
48. *Nullum crimen sine lege* (along with *nulla poena sine praevia lege poenali*) is a fair trial guarantee that—as a legal matter—protects an individual from being tried and punished for an act or omission that was not criminal at the time of the act or omission:
- (a) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

- (b) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. (Article 15.1)
49. CCPR/C/GC/32, Human Rights Committee, *General Comment Number 32, Article 14: Right to Equality Before Courts and to a Fair Trial*, para. 19. “The requirements of independence refers in particular to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age ... **and the actual independence of the judiciary from political interference by the executive branch and legislature**” (emphasis added). In its *General Comment Number 32, Article 14* of the ICCPR, the UN Human Rights Committee (HRC) stated that “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”
 50. Available at: www2.ohchr.org/english/law/indjudiciary.htm.
 51. Article 2.2: “A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary,” available at: unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.
 52. Available at: ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.
 53. Vienna Convention on the Law of Treaties, Article 27.
 54. CCPR/C/GC/32 Human Rights Committee, *General Comment Number 32, Article 14*, August 23, 2007, para. 4, available at: refworld.org/docid/478b2b2f2.html.
 55. Bangladesh states that “while the existing laws of Bangladesh provide that, in the ordinary course, a person shall be entitled to be tried in his presence; it also provides for a trial to be held in his absence if he is a fugitive offender, or is a person who, being required to appear before a court, fails to present himself or to explain the reasons for non-appearance to the satisfaction of the court.” Bangladesh’s reservations to the ICCPR are available at: treaties.un.org/Pages/Declarations.aspx?index=Bangladesh&lang=_en&chapter=4&treaty=326.
 56. International law does not explicitly ban capital punishment per se, although its application under many circumstances is illegal. For a summary of legal standards on the death penalty, see ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx.
 57. In February 2002, the United Nations withdrew from negotiations with the Cambodian government based on the conclusion that, at that time, and on the basis of the government’s position, “the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment.” See “Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York, 8 February 2002,” available at: un.org/news/dh/infocus/cambodia/corell-brief.htm. The negotiations between the UN and the Cambodian government had originated from a request by Prince Ranariddh and Hun Sen (by letter of June 21, 1997), at the time co-Prime Ministers of Cambodia. In February 2003, the General Assembly, “desiring that the international community continued to respond positively” to efforts to investigate Khmer Rouge-era atrocities and asked the Secretary-General to resume negotiations “without delay” (see A/RES/57/228, February 27, 2003). The agreement between the

UN and the Cambodian government concerning the ECCC was finally signed in 2003 and entered into force in October 2004.

58. According to a respected survey of Mexican households conducted by Mexico's national statistics agency (INEGI), in 2014, Mexicans reported only 7.2 percent of crimes to authorities. *National Poll of Victimization and Perception on Public Security (ENVIPE 2015)*, Main Results, September 30, 2015, 23–25.
59. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 11. "CICIG's resolution of the *Rosenberg* murder and indictment of former President Portillo and former Interior Minister Vielmann demonstrated that a large, well-funded, well-equipped, well-secured prosecution entity could hold the 'untouchables' accountable. These results alone would have been enough to justify CICIG's \$15 million average annual budget. In addition, the Commission publicly challenged the election of judges it categorized as unfit to serve on Guatemala's highest courts, orchestrated the dismissal of two attorneys general, facilitated the appointment of an outstanding chief prosecutor, and successfully pushed for the removal of some 1,700 police officers. CICIG prepared and lobbied for an extensive set of constitutional and legislative reforms. Its use of wiretapping and sophisticated forensic technologies demonstrated the potential for dramatically increasing Guatemala's criminal investigation capacity."
60. For example, in the case of Cambodia, the Office of the High Commissioner for Human Rights in Phnom Penh has undertaken various legacy initiatives (in collaboration with the ECCC) concerning judicial trainings and annotations of the Cambodian Penal Code with relevant ECCC case law. UN Women has worked with the court in relation to various gender-related initiatives.
61. Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia*, September 2012, 2.
62. For a comprehensive review of how support for a mechanism can be integrated into general rule-of-law development, see Open Society Foundations, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011.
63. See ICTY, *Furundzija*, IT-95-17/1, Trial Chamber Judgment, December 10, 1998, para. 155; IACtHR, *Barrios Altos v. Peru*, Judgment, May 14, 2001, para. 44; ECHR, *Ould Dah v. France*, Decision of March 17, 2009; SCSL, *Prosecutor v. Moinina Fofana*, Appeals Chamber Decision on Preliminary Motion on Lack of Jurisdiction, Illegal Delegation of Jurisdiction by Sierra Leone, May 25, 2004, para. 3. See also UN Human Rights Council, *Concluding Observations, Chile*, CCPR/C/CHL/CO/6, August 13, 2014, para. 9; and UN Committee against Torture, *Concluding Observations, Spain*, CAT/C/ESP/CO/5, December 9, 2009, para. 21(2).
64. J-M. Henckaerts and L. Doswald Beck, *Customary International Humanitarian Law: Volume I: Rules, Rule 159* (Cambridge: International Committee of the Red Cross), 611–14.
65. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 12.
66. This challenge was somewhat mitigated by the hiring of local, continental system lawyers to draft commentaries on Bosnia's new Criminal Procedure Code.
67. This represented a missed opportunity to grapple with reform to the Iraqi system on its own terms and limited the general impact on Iraqi legal development.
68. For example, the death penalty meant that the UN was unable to engage with the IHT. Williams, *Hybrid and Internationalised Criminal Tribunals*, 115.

69. See K. Gibson and C. Buisman, “Acquitted by Law, Prosecuted by Propaganda,” 2014 [blog post], available at: justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/. See also P. Besnier, deputy registrar of the ICTR, at the International Legacy Symposium of the ICTR, November 2014, in this video presentation youtube.com/watch?v=IEDeoDEZiVo (see video at 1:43 min). See also Kevin Jon Heller, “What Happens to the Acquitted?” *Leiden Journal of International Law* 21: 663–80, available at: ssrn.com/abstract=1005772.
70. For identification of what these extra needs may be, see Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, 2011.
71. See Article 8bis of the Rome Statute as to the definition of “crime of aggression.”
72. The subject matter jurisdiction of the proposed chambers includes genocide, war crimes, crimes against humanity, and aggression. This is due to the fact that the DRC is a monist state and, as such, Rome Statute provisions are directly applicable domestically from the date of DRC’s ratification of the Statute (and, in relation specifically to the crime of aggression, the date of ratification of any subsequent amendments).
73. See Article 3 of the International Crimes (Tribunals) Act, 1973, available at: [ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/o/0618daaa2660e9b3c125771a00264b13/\\$FILE/International%20Crimes%20\(Tribunals\)%20Act,%201973%20\(as%20amended%20in%202009\).pdf](http://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/o/0618daaa2660e9b3c125771a00264b13/$FILE/International%20Crimes%20(Tribunals)%20Act,%201973%20(as%20amended%20in%202009).pdf).
74. Article 6.11 (Chapter II, Solutions), Arusha Peace and Reconciliation Agreement for Burundi, August 28, 2000.
75. Agreement on the Resolution of the Conflict in the Republic of South Sudan, August 17, 2015, available at: unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.
76. Agreement on the Resolution of the Conflict in the Republic of South Sudan, August 17, 2015, 42–43, available at: unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.
77. This body has been largely perfunctory. It also had a number of predecessors, such as the Special Criminal Court for Darfur.
78. Taken from Uganda ICD website: judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html.
79. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on June 27, 2014 (but not yet in force). Article 28A of the protocol gives the International Criminal Law section of the court power to try persons for the core three, as well as “unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.” It also notes that the assembly may extend this jurisdiction. African Union, EX.CL/846(XXV) Annex 5, STC/Legal/Min/7(1) Rev. 1, May 15, 2014, available at: iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf.
80. Constitution of Kenya (Amendment) Bill, 2009, insertion of new section 3A, available at: [kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2009/The_Constitution_of_Kenya_\(Amendment\)_Act_2009.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2009/The_Constitution_of_Kenya_(Amendment)_Act_2009.pdf).
81. Article 14, Resolution No. 10 of 2005, Law of the Supreme Iraqi Criminal Tribunal.

82. UNMIK/REG2000/64, Article 1.1.
83. The Draft Statute for an Extraordinary Criminal Court for Liberia, Article 11.4. The document appears as Annex 2 to the 2009 *Truth and Reconciliation Commission Report* (the ECCL was one of the recommendations arising from the TRC). The full report is available here: trcofliberia.org/resources/reports/final/trc-of-liberia-final-report-volume-ii.pdf.
84. Unofficial English translation available at: cja.org/cja/downloads/Duvalier%20Decision%20of%20the%20Court%20of%20Appeals%20of%20Port-au-Prince.pdf.
85. See Amnesty International, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, 2010, 5, available at: amnesty.eu/content/assets/Doc2010/Croatia_BehindWallOfSilence.pdf. “One of the key findings of Amnesty International’s research is that the legal framework itself in Croatia is inadequate for prosecution of war crimes cases. This is because it fails to define in accordance with current international standards the crucial concepts related to prosecution of crimes under international law such as command responsibility, war crimes of sexual violence and crimes against humanity.”
86. Article 6.1 of the Law No. 05/L-053, Law on Specialist Chambers and Specialist Prosecutor’s Office, states that the Specialist Chambers “shall have jurisdiction over crimes set out in Articles 12–16 **which relate to the Council of Europe Assembly Report**” (emphasis added). Article 6.2 gives the Specialist Chambers additional jurisdiction over certain offences in the Kosovo Criminal Code. These include offences against the administration of justice and offences against public officials, but again Article 6.2 limits the jurisdiction to those offences relating to the “official proceedings and officials” of the Specialist Chambers.
87. See, for example, *Rule 77: Contempt of the Tribunal, of the ICTR Rules of Procedure and Evidence*, available at: unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf. *Rule 77* was introduced into the RPE along with a number of amendments to the rules in May 2003, some years into the tribunal’s operation.
88. See Rome Statute of the International Criminal Court, Articles 70 and 71. For a recent example of the application of these provisions in practice, see ICC press release, “*Bemba et al.* Case: Chamber VII Finds Five Accused Guilty of Offences Against the Administration of Justice,” October 19, 2016, available at: icc-cpi.int/pages/item.aspx?name=pr1245. The five were sentenced on March 22, 2017, details of which are available here: icc-cpi.int/Pages/item.aspx?name=pr1287.
89. In Cambodia, early researchers concluded that crimes of sexual violence, outside the context of forced marriage, were not a feature of Khmer Rouge atrocities. This may have had a disproportionate influence on early decision-making within the Office of the Co-Prosecutors. While this example is an operational one, by analogy, it highlights the danger of basing decisions on early fact-finding deficits.
90. The proposed statute included an overly broad definition of “terrorism” and a definition of the crime of “forcible recruitment of child soldiers” that was too narrow. See Human Rights Watch, *Justice for Liberia: The Truth and Reconciliation Commission’s Recommendation for an Internationalized Domestic War Crimes Court*, December 2009, available at: hrw.org/news/2009/12/11/liberia-trc.
91. As of October 2017, more than nine years after establishment of the ICD (initially called the “War Crimes Division”), the division had begun (but not completed) only one war crimes case. See the annex to this report on Uganda.

92. See, for example, Article 5, ICTR Statute, available at: unctr.org/en/documents. Pursuant to Article 6(2), the “official position of any accused person, whether as Head of state or government or as a responsible government official,” does not relieve him or her of criminal responsibility nor mitigate punishment. Further, according to Article 6(4), acting pursuant to official/superior orders is not a defense, but may be considered in mitigation.
93. The proposed Specialized Chambers in the Democratic Republic of Congo would have had jurisdiction over “legal entities.” Additionally, while nonjudicial in nature, the Commission against Impunity in Guatemala (CICIG) has power to, inter alia, “determine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing, [etc.]” and to “collaborate with the State” in the dismantling of them (Article 2.1 (a) and (b) of the CICIG Agreement). While the function of the CICIG is to promote the investigation, criminal prosecution and punishment of the “members” of the aforementioned groups (Article 2.1 (b), CICIG Agreement), it also has a role in seeing them eradicated and/or dismantled.
94. Text of the draft articles on crimes against humanity adopted by the commission on first reading, UN Doc. A/72/10, 2017, Article 6(8) (“Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offenses referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.”)
95. Although beyond the scope of this handbook, joint criminal enterprise has been found to encompass three categories (known as JCE I, II, and III, respectively) and—in respect of the ICTY and ICTR Statutes to be read into the word “committed” in Article 7(1)/6(1) of the ICTY/ICTR Statutes, respectively. See *Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgment, July 15, 1999. See also, Giulia Bigi, “Joint Criminal Enterprise in the Jurisprudence of the [ICTY] and the Prosecution of Senior Political and Military Leaders: The *Krajišnik* Case,” available at: www.mpil.de/files/pdf3/mpunyb_02_bigi_14.pdf.
96. This form of joint criminal enterprise liability holds an individual who intentionally participates in a JCE responsible for crimes committed outside of the common plan if those crimes were reasonably foreseeable yet he/she willingly took the risk that they would be committed.
97. See Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), May 20, 2010, para. 87, available at: eccc.gov.kh/sites/default/files/documents/courtdoc/D97_15_9_EN.pdf. See also, M. Karnavas, “Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision Against the Application of JCE III and Two Divergent Commentaries on the Same,” *Criminal Law Forum* 21 (2010): 445–94.
98. See M. Milanović, “An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon,” *Journal of International Criminal Justice* 5 (2007): 1139–52.
99. States basing modes of liability on the Rome Statute may not be using the most inclusive definitions of liability. At least according to some commentators, while the Rome Statute criminalizes joint commission and contributing to the commission of an offence via a common purpose, it doesn’t contemplate extended form joint criminal enterprise liability. See, generally, Article 25 of the Rome Statute, in particular

paragraphs (3)(a) and (d). For commentary to the effect that the Rome Statute does not encompass JCE III liability, see, for example, K. Heller, “JCE III, the Rome Statute, and Bashir,” available at: opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute.

100. In the case of the ICTY and the ICTR, broad personal jurisdictional mandates (i.e., “persons responsible”) resulted in open-ended, lengthy investigations and long dockets which—after some years of operation—required Security Council and judicial attention. This resulted in the passing of amendments to the tribunals’ respective Rules of Procedure and Evidence in the form of Rule 11*bis*, so that the tribunals could focus on more serious cases while cases against less serious offenders were transferred to domestic jurisdictions.
101. For a comprehensive analysis of this issue, see, for example, Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update*; and Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: November 2011 Update*. See in particular, November 2011 Update report at pages 13–15 (incl.), which describes personal jurisdiction as a “legal ruse” and a “legal solution to a political problem.”
102. In many cases, such challenges on the basis of *nullem crimen sine lege* have been overcome when judges concluded that the underlying conduct was criminal under national or international law at the time of commission. Jurisprudence has established that the *nullum crimen* test can be satisfied even if the conduct is not criminalized in the exact same way it is later prosecuted. See, for example, *The Prosecutor v. Milutinović, et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 38 (ICTY Appeals Chamber, May 21, 2003) (“*Nullum crimen* does not prevent a court from interpreting and clarifying the elements of a particular crime”); *The Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber, November 12, 2002) (“In interpreting the principle of *nullem crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offense in substantive criminal law, is of primary relevance,” para. 62), (“The principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated,” para. 165).
103. Valentina Spiga, “Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga,” *J Int Criminal Justice* 9, no. 1 (2011): 5–23, at 1. The author says, “The Court of Justice was wrong in holding that there would be a difference between an ad hoc tribunal (which would be entitled to apply criminal law retroactively) and a Senegalese court (which would instead not be empowered to do so).”
104. The ICTR’s temporal jurisdiction was specifically designed to allow scrutiny of alleged atrocities committed by the Rwanda Patriotic Front (RPF). However, the ICTR failed to indict anyone from the RPF side, which formed the incumbent government in Rwanda. The Office of the Prosecutor transferred some case files involving RPF suspects to Rwanda, where prosecutions were carried out, though these trials were criticized as being a “whitewash”—generally low-level players were “scapegoated” for the alleged actions of those further up the chain of command.
105. For example, the ICTR’s mandate comprised the full calendar year of 1994 in spite of the fact that the Rwandan genocide was largely perpetrated over the course of 100 days (from April to July 1994). In theory, this could have allowed for the prosecution of those who perpetrated crimes on the side of the RPF.

106. Sigall Horovitz, “Sierra Leone: Interaction between International and National Responses to the Mass Atrocities,” *DOMAC/3* (December 2009): 33–34.
107. See B. Tabbarah, “The Legal Nature of the Special Tribunal for Lebanon,” in *The Special Tribunal for Lebanon*, ed. Alamuddin, Jurdi, and Tolbert (Oxford: Oxford University Press, 2014), 49. “The Special Tribunal for Lebanon is a sui generis international institution. ... The Tribunal is not a treaty-based international tribunal because its founding instrument is not a treaty duly ratified by Lebanon. Neither is it a tribunal duly integrated into the Lebanese court system.”
108. See Beth Van Schaack, “The General Assembly and Accountability for Grave Crimes,” *Just Security*, February 27, 2017, available at: justsecurity.org/38145/general-assembly-accountability-international-crimes. Russia argued unsuccessfully that the General Assembly should not be able to authorize the IIIM because it is “prosecutorial in nature.” See Alex Whiting, “Russia Maintains Objection to General Assembly’s Mechanism for Syria,” *Just Security*, February 24, 2017, available at: justsecurity.org/38084/russia-maintains-objection-general-assemblys-mechanism-syria/.
109. Even though state parties to the Rome Statute with monist systems can directly apply the Statute’s provisions, the experience in DRC has shown that a lack of implementing legislation can create complications to doing so. See Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, 2011, 27–29, available at: opensocietyfoundations.org/reports/putting-complementarity-practice.
110. The SCSL had an international prosecutor and international judges who constituted the majority in each chamber of the court. (Rather than “international” versus “Sierra Leonean” officers, the distinction was between who had the power of appointment: the UNSG, or the government of Sierra Leone). In the case of the ECCC, there was equal balance of power between the co-prosecutors (one international and one Cambodian) and the co-investigating judges (one international and one Cambodian), though with special legal provisions intended to resolve disputes between them.
111. Although the binding nature of the legal instruments creating the ICTY and the ICTR proved fruitful in many instances, it should be noted that both states acquiesced in the investigation and prosecution of cases on their territories (at least to a large extent).
112. Ad hoc and early hybrid tribunals were not immune to this litigation; however, since challenges to these tribunals’ authority (i.e., the power of the Security Council to establish an ad hoc tribunal pursuant to its UN Charter peace and security powers) were also brought in the early operational phase of these courts.
113. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 12.
114. The UN itself has acknowledged shortcomings at both the ICTR and ICTY that have had adverse effects on the rights of the accused. See UN Secretary-General’s Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 45. “Many suspects before the two ad hoc tribunals have had to spend lengthy periods in detention waiting for their trials to start. With regard to the ad hoc international tribunals, many of those trials have taken a very long time to complete, due in part to the complexities of prosecuting international crimes.”
115. Open Society Justice Initiative, *Justice in DRC: Mobile Courts Combat Rape and Impunity and Eastern Congo*, January 2013.
116. “Security Main Concern in Saddam Hussein Trial,” *Voice of America*, October 27, 2009.

117. For example, despite the ICTR's establishment as a wholly international tribunal located outside the country, the Rwandan government was still able to greatly influence the tribunal's docket so that no indictments were ever laid by the ICTR against members of the Rwanda Patriotic Front (RPF). There are also other examples of Rwanda's political influence on judicial decision-making in the ICTR. For a discussion of these, see, for example, Reydam, Wouter, and Ryngaert, eds., *International Prosecutors* (Oxford: Oxford University Press, 2012), 379–85.
118. P.N. Pham, P. Vinck, M. Balthazard, and S. Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkeley, 2011).
119. However, even if the mechanism is located outside of the affected country, witnesses, victims, and families still located in the affected country may face danger. While the Kenya cases before the ICC are not specifically part of this handbook, it is noteworthy that the remote location of trials against senior officials did not shield the cases, nor the witnesses in those cases, from risk. The ICC's Kenya prosecutions collapsed amid extensive allegations of witness tampering and killings. See, for example, "Claims of Witnesses in ICC Kenya Trial Disappearing," *BBC*, February 8, 2013.
120. See Tracey Gurd, "Arresting the 'Big Fish': Lessons on State Cooperation for the International Criminal Court," in *The Enforcement of International Criminal Law*, ed. Aegist Trust (2009), 27–34.
121. See Jo Becker, "Campaigning for Justice: Human Rights Advocacy in Practice," *Stanford Studies in Human Rights* (2013): 113–30.
122. ECCC Agreement, Article 27(1).
123. Gideon Boas, et al., *International Criminal Procedure*, International Criminal Law Practitioner Series, vol. 3 (Cambridge: Cambridge University Press, 2011), 260–61.
124. For discussion of "horizontal" versus "vertical" prosecution structures, see Guénaël Mettraux et. al., *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, December 2014, 63–65.
125. *Ibid.*, 64.
126. See War Crimes Research Office (American University Washington College of Law), *Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor*, October 2012, 19–23.
127. International Criminal Court, Office of the Prosecutor, *Strategic Plan 2016–2018*, November 16, 2015, 40.
128. The investigation of former Liberian President Charles Taylor did not start in earnest until after his apprehension and transfer to the court in 2006. The team on that case drew extensively on those who previously worked on the investigation and prosecution of members of the Taylor-aligned Revolutionary United Front and Armed Forces Revolutionary Council.
129. Rupert Skilbeck, "Ensuring Effective Defence in Hybrid Tribunals," *Revue Québécoise de Droit International* (2010): 95.
130. *Ibid.* See also Rupert Skilbeck, "Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone," *Essex Human Rights Review* 1, no. 1 (2004).
131. Both ICTY and ICTR statutes outline a number of due process guarantees that correspond with those in Articles 9(2), 14, and 15 of the International Covenant on Civil

- and Political Rights (see Articles 9, 19, and 20 of the ICTR statute, as well as Articles 10, 20, and 21 of the ICTY statute).
132. Articles 14 and 15 of the statutes of the ICTR and ICTY, respectively, grant power to the judges of the tribunals to adopt rules of procedure and evidence “for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate measures.”
 133. Article 13 of the STL statute—which deals with the defence office—grants power to the UN Secretary-General (in consultation with the president of the tribunal) to “appoint an independent Head of the Defence Office” who is responsible for the appointment of staff in that office and also for the drawing up of a list of defence counsel. It also articulates the responsibilities of the office. This STL was the first mechanism of its kind to give equal formal status to defence and prosecution offices. (See John R.W.D. Jones and Miša Zgonec-Rožej, “Rights of Suspects and Accused,” in *The Special Tribunal for Lebanon*, ed. Alamuddin, Jurdi and Tolbert, 191.
 134. Skilbeck, “Ensuring Effective Defence,” 93.
 135. Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Center for Transitional Justice, March 2006, 31–32.
 136. Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Justice Initiative, 2010, 101–5.
 137. Open Society Justice Initiative, *Putting Complementarity into Practice*, 2011, 36–37.
 138. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 2016, 118.
 139. Open Society Justice Initiative, *Putting Complementarity into Practice*, 72–73.
 140. *Ibid.*, 42.
 141. See Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, QC, *Selecting International Judges: Principle, Process, and Politics*, International Courts and Tribunals Series (Oxford: Oxford University Press, 2010).
 142. With regard to implications for fair trial rights, see Skilbeck, “Ensuring Effective Defence,” 92.
 143. The Bangalore Principles of Judicial Conduct, 2002.
 144. Article 13, ICTY Statute, Article 12 ICTR Statute.
 145. Article 13.1, ICTY Statute, Article 12.1, ICTR Statute.
 146. Article 13, SCSL Statute.
 147. Alejandro Chehtman, “Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a ‘Success Story,’” *Journal of International Criminal Justice* 9 (2011): 566.
 148. Rome Statute, Article 36 (8).
 149. See “Beijing +20: Past, Present and Future: The Representation of Women and the United Nations System,” available at: unwomen.org/en/digital-library/publications/2015/03/the-representation-of-women-and-the-united-nations-system.
 150. See Kelly Askin, *The Power of Women in Advancing the Cause of Gender Justice*, Open Society Foundations, March 7, 2013, available at: opensocietyfoundations.org/voices/power-women-advancing-cause-gender-justice.
 151. The author, then an official in the Office of the Prosecutor, participated in a working group that had drafted a code of conduct that had not been approved by the court’s

principals or circulated to staff. For background on the incident, in which the investigator was eventually acquitted of the charges, see “‘I Was Brutalised,’ Says Cleared UN Worker,” *Sydney Morning Herald*, October 15, 2005.

152. An expert commission reviewing mechanisms in East Timor concluded in 1999 that “it would be remiss to recommend the establishment of any form of criminal tribunal without a corollary emphasis on first, the importance of secure, sufficient and sustainable levels of funding.” See *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, May 26, 2005, 28. Similarly, a report from the Secretary-General in 2004 concluded, in reference to the experience at the Special Court for Sierra Leone, that “the operation of judicial bodies cannot be left entirely to the vagaries of voluntary funding.” See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para. 43. In relation to the ECCC, see also David Scheffer, “No Way to Fund a War Crimes Tribunal,” *New York Times*, August 28, 2012, “This is no way to fund a major war-crimes tribunal with a historic mandate to achieve accountability, finally, for one of the 20th century’s worst slaughters of innocent civilians. Voluntary government assistance for war crimes tribunals is a speculative venture at best, and depends on so many unpredictable variables as years roll by that the original objective is sometimes forgotten.”
153. In 2011, victims in one case received reparations with the support of UN Women. See monusco.unmissions.org/en/un-supports-songo-mboyo-rape-victims-drc.
154. OHCHR, *Rule of Law Tools (Hybrid Courts)*, 8, available at: ohchr.org/Documents/Publications/HybridCourts.pdf.
155. By Resolution 74 (I) of December 7, 1946, the General Assembly Established the United Nations Board of Auditors to audit of the accounts of the United Nations organization and its funds and programs and to report its findings and recommendations to the General Assembly through the Advisory Committee on Administrative and Budgetary Questions, available at: daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/033/25/IMG/NRO03325.pdf?OpenElement.
156. *First Annual Report of the President of the Special Court for Sierra Leone, for the Period between December 2, 2002, and December 1, 2003*, 29, available at sc-sl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176.
157. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, Article 7, available at sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176.
158. United Nations Secretary-General, *Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone*, S/2002/246, March 8, 2002, Appendix 3, available at: un.org/en/ga/search/view_doc.asp?symbol=S/2002/246.
159. Open Society Justice Initiative, *Against the Odds: CICIG in Guatemala*, 2016, 8.
160. Open Society Justice Initiative, *Putting Complementarity into Practice*, 2011, 79–80.