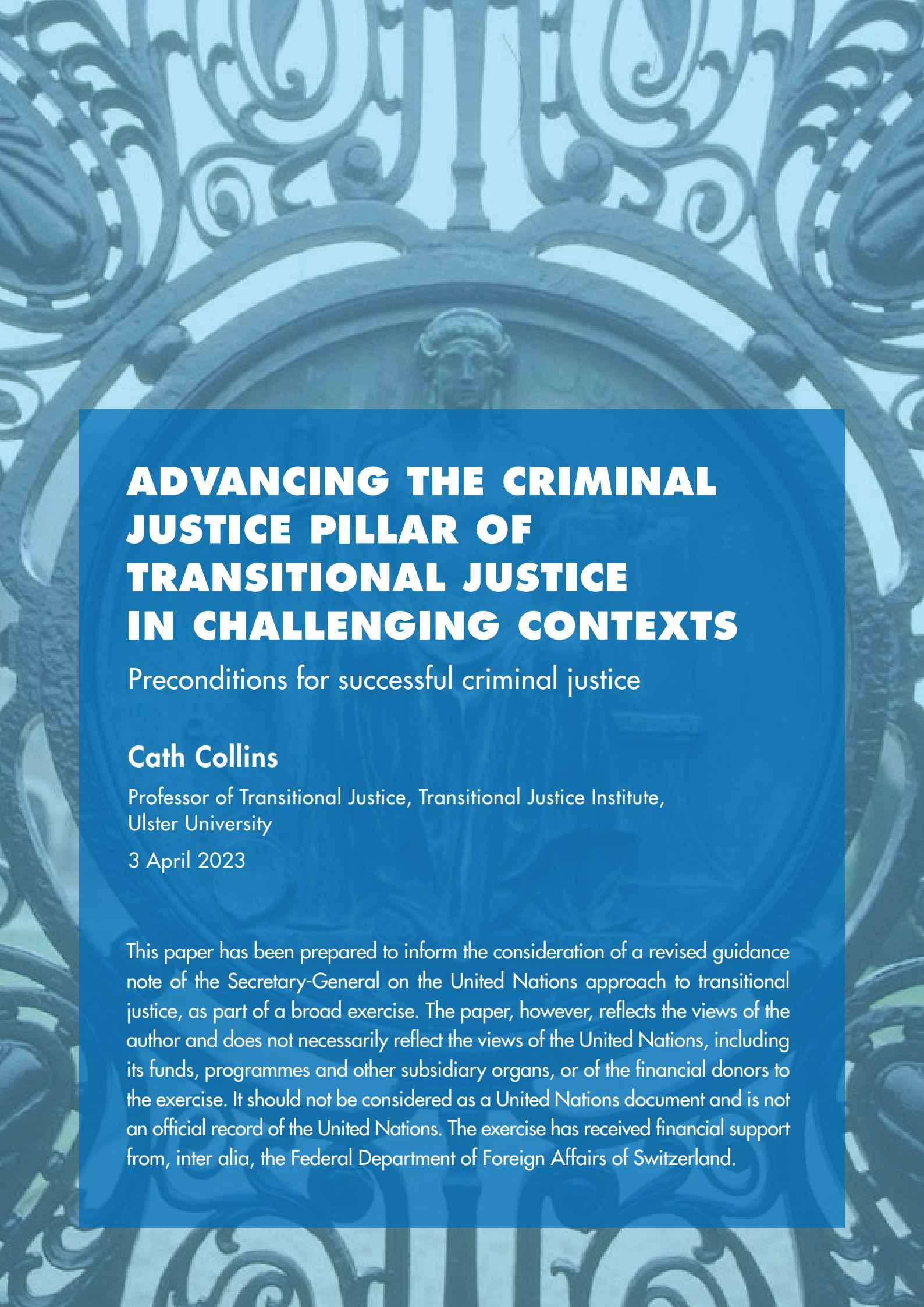
ADVANCING THE CRIMINAL JUSTICE PILLAR OF TRANSITIONAL JUSTICE IN CHALLENGING CONTEXTS

Preconditions for successful criminal justice



ADVANCING THE CRIMINAL JUSTICE PILLAR OF TRANSITIONAL JUSTICE IN CHALLENGING CONTEXTS

Preconditions for successful criminal justice

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This paper has been prepared to inform the consideration of a revised guidance note of the Secretary-General on the United Nations approach to transitional justice, as part of a broad exercise. The paper, however, reflects the views of the author and does not necessarily reflect the views of the United Nations, including its funds, programmes and other subsidiary organs, or of the financial donors to the exercise. It should not be considered as a United Nations document and is not an official record of the United Nations. The exercise has received financial support from, inter alia, the Federal Department of Foreign Affairs of Switzerland.

CONTENT

Introduction: the place of criminal justice in transitional justice

A distinctive characteristic of transitional justice is to seek mutually reinforcing advances across each of its dimensions: truth, justice, reparations and guarantees of non-repetition.[1] One expression of this holism[2] is consideration of which course(s) of action can contribute to the greatest forward movement in substantive transitional justice overall, creating positive impact in one or more dimensions while avoiding possible backsliding in another. This interdependence means that **justice cannot be treated as an agenda to be pursued separately from truth, reparation and guarantees of non-repetition**, which are affected by it, and this may influence how justice decisions need to be defined, viewed and implemented.

Transitional-justice-like tools are now deployed in an increasingly diverse range of settings, including authoritarian and post-authoritarian settings, conflict and post-conflict settings,[3] so-called complex settings (including intra-democratic transitions and historical harms in settler colonial societies such as Australia, Canada, New Zealand, South Africa and the United States of America) and settings in the Middle East and North Africa, where economic and corruption-focused grievances have featured as prominently as authoritarian repressive harms have done.[4] These four types of setting vary widely in their characteristics, which include different levels of institutional strength and "Stateness", rule of law capacity, legal culture, types of perpetrator and capacity to pursue the meaningful prosecution of harms suffered.[5] Furthermore, the field of transitional justice has changed internally, including through the emergence of transformative emphases and decolonial critiques and self-critiques.[6]

1 This concept of transitional justice along four dimensions follows prevailing usage during most of the first decade of the relevant United Nations special rapporteurship, being the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The recent proposal of memorialization as a fifth dimension is an important issue but is not addressed here. 2 See the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice, issued in 2017 (A/HRC/36/50/Add.1) and the Special Rapporteur's report of 2012 (A/HRC/21/46). 3 See A/HRC/36/50 and other reports from the same period by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the considerably changed transitional justice environment, specifically in post-conflict settings with weakly institutionalized States. While not all post-conflict settings are of this type, this document is particularly concerned with this type of setting. 4 There are also some cases where authoritarian regimes have mutated or reconfigured rather than transitioning as such. 5 Difficult-to-prosecute grave harms include long-standing colonial harm, inequality perceived as resulting from patrimonialism or extractivist economic policy, and crimes committed so long ago that their individual direct perpetrators are now deceased. 6 Abdullahi An-Na'im, "From the neocolonial 'transitional' to indigenous formations of justice", *International Journal of Transitional Justice*, vol. 7, No. 2 (June 2013), pp. 197–204. See also the African Transitional Justice Hub at www.csvr.org.za, and work written and edited by Paul Gready and Simon Robins, Zinaida Miller and Rama Mani.

Both transitional justice and the context(s) of application of transitional justice measures have thus significantly changed since the publication in 2010 of the guidance note of the Secretary General on the United Nations approach to transitional justice. In the area of international criminal justice, obvious examples of these changes include greater emphases on traditional justice alternatives and on collective criminality, including corporate criminality. Head-of-State immunity remains a vexed question.[7] International, regional, State-level, and sub-State elements, actors and norms overlap and interact in an increasingly complex, actor-dense and decentralized accountability environment. It is nonetheless possible to detect an ongoing "domestic turn"[8] in developments since the early 2000s, beginning with the development of completion strategies by the two ad hoc tribunals: the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Next came the creation of a treaty-based permanent venue with strong complementarity, the International Criminal Court. Then came hybrid tribunals, with internationalized components;[9] and finally, a turn toward domestic prosecution of international crimes under special jurisdictional arrangements.[10] Meanwhile, ordinary domestic prosecution of such crimes, or at least efforts to bring them before ordinary courts, have long been a reality. So, too, have parallel uses of customary justice channels, some of which are traditional, restorative or community-based in nature. Since the 1990s, State-level prosecution has increasingly utilized non-venue States under universal jurisdiction principles.

While extraterritorial prosecution can serve some definitions of justice and may advance other transitional justice rights, only a relatively narrow range of offences and offenders can usually be addressed, while positive externalities for domestic constituencies often

7 See Evelyne Owiye Asaala, "The politics of transitional justice and corporate accountability for atrocities: options under international law", *International Journal of Transitional Justice,* vol. 16, No. 3 (November 2022), pp. 467–477; and Kamari M. Clarke, ed., *Africa and the ICC: Perceptions of Justice* (Cambridge, Cambridge University Press, 2017). On regional distinctiveness, see HRC/A/36/50/Add.1; African Commission on Human and Peoples' Rights, *Study on Transitional Justice and Human and Peoples' Rights in Africa* (Banjul, 2019); European Unionw, "The EU's policy framework on support to transitional justice" (November 2015); and Inter-American Commission on Human Rights, *Compendium of the Inter-American Commission on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts* (2021). 8 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th ed. (Oxford, Oxford University Press, 2020), p. 162. The authors chart a "perceptible increase" in prosecution by domestic courts, whether they are located in the venue State or in a third country. The report of the Secretary-General of the United Nations on the rule of law and transitional justice in conflict and post-conflict zones (S/2004/616) states that international and mixed tribunals "have contributed little to sustainable national capacities for justice administration." See also Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (New York and Geneva, United Nations, 2006), p. 30. OHCHR recommends hybridization as promising "more impact" than extraterritorial alternatives. 9 Werle and Jessberger, *Principles of International Criminal Law,* from p. 136. The authors discuss several examples of hybridization, including the Special Panels for Serious Crimes in East Timor in 2000, the Special Court for Sierra Leone in 2002 and the Special Criminal Court in the Central African Republic, established in 2015 but not operational until 2017. For open-source background information on international and hybrid instances, see www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/. See also Elena Naughton, *Committing to Justice for Serious Human Rights Violations* (New York, International Center for Transitional Justice, 2018), available at www.ictj.org/publication/committing-justice-serious-human-rights-violations-lessons-hybrid-tribunals. The OHCHR report, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York and Geneva, United Nations, 2008) considers ways to maximize desirable domestic outcomes beyond the lifespan of a court. 10 Under hybrid iterations, tribunals' international elements and "credentials" have been foregrounded in various ways: via third-country hosting; through the use of mixed, usually majority-international, panels of judges; by copying the mandates, legal concepts and theories and procedural codes of the ad hoc tribunals for Rwanda and the former Yugoslavia; and/or through splicing international law with national norms and laws. By contrast, the Special Jurisdiction for Peace of Colombia (Jurisdicción Especial para la Paz, or JEP) is a domestic special court in all but name, operated in-country by exclusively national judges. JEP's use of international criminal law passes through a domestic "gateway", inasmuch as this is based on the so-called "constitutional bloc", which treats some norms of international criminal law as already forming part of the domestic legal order. Moreover, JEP conjoins the principles of transitional justice and international criminal law in a very particular way, including but not limited to a "special" (i.e. lenient) sanction regime. See Kai Ambos and Stefan Peters, eds., *Transitional Justice in Colombia: The Special Jurisdiction for Peace* (Baden-Baden, Nomos, 2022), especially pp. 63–160, available at www.nomos-elibrary.de/10.5771/9783748923534/transitional-justice-in-colombia.

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prove elusive. This document focuses on the domestic accountability space, which current trends tend to reaffirm as the primary environment for addressing violence of the sorts usually considered relevant to transitional justice (or "TJ-relevant violence"), with or without complementary international justice activity. It further focuses on preconditions and initial considerations regarding criminal justice. The paper contends that **narrow "norm transfer" approaches are unlikely to succeed, with detailed country diagnostics needed to craft workable, locally grounded appreciations of how the best interests of justice can be served in a particular setting at a given time** – a maxim that has frequently been expressed over the course of a decade of dedicated expertise in transitional justice on the part of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.[11] It is also suggested that regional or subregional governance structures and associated human rights regimes offer a useful backstop for necessarily and desirably diverse manifestations of transitional justice.[12]

For the preparation of this document, one-to-one conversations were conducted with actors with close knowledge of justice activities in domestic settings across 12 countries.[13] The author thanks those involved, who were consulted in a personal capacity, and whose names are reserved, as agreed.

11 In his statement of October 2015, the Special Rapporteur called for "the adoption of approaches to vetting that stand a realistic chance of being implemented." This may at times require devising route maps which, while not altering destinations, minimize unnecessary friction. **12** The "backstop" notion, as referred to here, refers not to putative direct prosecution mandates, as per the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), but to the considerable scope for existing regional human rights regimes in Africa, Latin America and Europe to further assist normative, jurisprudential and policy development in transitional justice at the national level. Subregional entities such as the Association of Southeast Asian Nations (ASEAN), the Southern Common Market (MERCOSUR) and the Economic Community of West African States (ECOWAS) increasingly also feature, while Werle and Jessberger report "increasing efforts to regionalize international criminal prosecution", referring to the Extraordinary African Chambers and the Kosovo Specialist Chambers. See Werle and Jessberger, *Principles of International Criminal Law.* **13** These countries were Argentina, Chile, El Salvador, the Gambia, Guatemala, Kenya, Liberia, the Philippines, South Africa, Spain, the United Kingdom of Great Britain and Northern Ireland (specifically with regard to Northern Ireland) and Uruguay. The inter-American system was also discussed. The relative under-representation of Asian settings is acknowledged and regretted. For criminal justice processes contemporaneous with, and supported by, ongoing peacekeeping operations mandated by the United Nations Security Council, see related research being undertaken by the Department of Peace Operations and other entities.

A. Transitional justice and the criminal justice context: opportunities, obstacles, areas for consideration

In difficult contexts, domestic accountability opportunities often come from unexpected quarters. While a cohesive strategy is always useful, flexibility should also be prized. This flexibility may need to include acceptance of "upload" as well as "download" between international norms and their national or regional equivalents.

Awareness is required of the distinctiveness of amnesty dynamics in post-conflict situations as opposed to post-authoritarian settings, and there needs to be a willingness to look beyond international crime labels to discern the potential for accountability under ordinary criminal and civil law. Furthermore, the risk that best practice lessons from one setting may prove unworkable or even harmful in another should be actively acknowledged and guarded against.

1. *THE WIDER "TJ-SCAPE"*

a. Social will

Social will should be considered a third key determinant of accountability dynamics, alongside political will[14] **and the capacity of the justice system.** Keeping the diversity of social will in view helps anticipate possible anti-accountability sentiment at the level of general populations, as opposed to solely among privileged or elite actors. It also helps to avoid the pitfall of treating civil society associations and mobilized groups – especially the more vocal ones – as unproblematically representative of societal views. In other words, **it is useful, although it may be difficult in practice, to distinguish between general or majority social will and the preferences of key transitional justice rights holders.** These key actors include associations of victims, survivors and relatives. Such associations, their allies and legal representatives and other groups with a legitimate interest in justice[15] have been a decisive driver of accountability, albeit operating below the radar at times. The more organized, proactive and experienced

14 See, for example, a (somewhat dated) survey carried out in Liberia: www.wilsoncenter.org/publication/the-road-to-peace-liberia-citizen-views-transitional-justice. 15 While this list of key actors is both more accurate and more capacious, the terms "victims", "survivors" and "relatives associations" or "survivors associations" are at times used as shorthand in the interests of readability.

of these active subjects are increasingly likely to have international reach and expression, through diaspora and affinity and solidarity connections.[16] **Particular efforts are needed, however, to reach less formally structured groups and to engage the non-mobilized,** whose rights and needs are at greater risk of being overlooked.[17]

Understanding the scope and strength of both pro- and anti-prosecution sentiment is important not only for instrumental or strategic reasons (i.e. as a prelude to efforts to change public perception) but also to inform justice decisions and design. Popular preferences and perceptions around justice can be extraordinarily influential, as was seen in Colombia in 2016.[18]

Where enthusiasm for prosecution exists but is selective, this selectivity should be examined. **Some forms of selectivity will be considered unjustifiable from a human rights or rule of law perspective,**[19] **while others can be important,** such as a preference for international or hybrid trials because of well-founded misgivings about the possibility of fair domestic outcomes.[20] It could also be argued that tailoring prosecutions in ways that deliberately seek political outcomes – such as a dilution of the power exercised by certain figures – is not only justifiable but necessary, for example if the action amounts to addressing the root causes of violence and thereby makes a contribution to guarantees of nonrepetition. This is just one of many ways in which system crimes, including atrocity crimes,[21] should be treated differently from what may be termed "ordinary" criminality.[22]

b. Timing

Timing affects the possibilities of justice in numerous ways. Contemporaneous justice efforts may be particularly susceptible to risks including reversal, appropriation and evident misuse,[23] while the passage of time may simply prove the maxim "justice delayed is justice denied." Taken to the extreme, delay may render criminal prosecution redundant once there are no living suspects left to try.[24] Alternatively, statutes of limitation may kick in, making formal prosecution impossible. On the other hand, **a certain amount of distance from crimes can allow opposition to prosecution to dissipate and can reduce a perpetrator's veto power or their ability to destabilize.** Facts, evidence and testimony may emerge, and judicial and other reforms may have time to take hold. Forensic techniques could

16 Coalitions including diaspora populations have been key in transitional justice accountability campaigns and in the drafting of concrete legislative proposals in Liberia (toward a war crimes court) and in El Salvador (seeking the introduction of laws on reparations and a search office for the disappeared). Diaspora connections have also been key in third-country civil and criminal cases, including those based on universal jurisdiction. Examples include cases concerning and between Belgium, Canada and Rwanda, Germany and the Syrian Arab Republic, and Spain and a range of Latin American jurisdictions. 17 The same characteristics that lead some groups to be identified as requiring differential attention often create additional barriers to mobilization, making it even more imperative to actively seek out and attend to these voices. 18 Perceptions that guerrilla forces had been offered undue leniency played at least some part in the failure of a plebiscite on a peace deal to produce the predicted ratification outcome. 19 For instance, people in divided post-conflict societies may support or demand the prosecution of members of the "out" group only, based solely on their in-group affinity, even if members of the "in" group also have a case to answer. 20 This is the case in many settings, including the Central African Republic and Liberia. 21 The term "system crimes" refers here not to State perpetration but to the irreducibly collective and structured ("macrocriminal") nature of the types of grave violations that are usually found in transitional justice settings. 22 Mark Osiel argues for the legitimacy of "extra-legal" social and political influences, which respond to divergent conceptions of justice and punishment. See Mark Osiel, "Choosing among alternative responses to mass atrocity: between the individual and the collectivity", *Ethics & International Affairs* (18 September 2015), available at www.ethicsandinternationalaffairs.org/online-exclusives/choosing-among-alternative-responses-to-mass-atrocity-between-the-individual-and-the-collectivity. See also Pádraig McAuliffe, "The roots of transitional accountability: interrogating the 'justice cascade'", review essay, *International Journal of Law in Context,* vol 9, No. 1 (February 2013), pp. 106–113, proof copy available at https://discovery.dundee.ac.uk/ws/portalfiles/portal/1815501/ijlic_proof.pdf. 23 Examples include the adoption and application of draconian "anti-terrorism" legislation and sanctions against political opponents while refusing to acknowledge or investigate atrocity crime allegations against one's own side. 24 This is referred to in Latin America as "biological impunity".

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be discovered or improved. This means that the optimal timing for initiating investigation, prosecution and related justice efforts is a matter of context. Accordingly, the monitoring and evaluation of reforms in the rule of law, justice and security should address the repercussions for transitional justice-related criminal justice, and vice versa. Ideally, transitional justice prosecution and rule of law interventions would be co-designed.

When transitional justice is undertaken as a consciously designed "TJ policy", processes are initiated in an orchestrated way, which can have many merits, including harmony between the four dimensions of transitional justice – although there is a risk of convergence attenuating the distinctive importance and contribution of each dimension.[25] For instance, if truth commissions come to be viewed as essentially a preliminary exercise for subsequent entitlement to reparations,[26] or for justice decisions,[27] this will condition the kinds of narrative and testimony they can elicit. This will almost certainly have a chilling effect on the willingness of perpetrators and their institutions or organizations to take part at all, and to reveal potentially compromising truths if they do.[28] If truth commissions are pushed too far toward adopting quasi-judicial procedures, they in effect become ad hoc pre-investigative units. If truth commissions thereby start to de-emphasize less justiciable harms, or are dissuaded from addressing broader historical and explanatory questions – a task that only truth commissions can really attempt – important opportunities may be lost. **From the perspective of transitional justice, then, the distinction between judicial and other equally necessary kinds of truth needs to be kept in view.**[29] Where truth commissions choose to pass information directly to prosecutorial authorities, recommending the prosecution of particular individuals (rather than the investigation of certain crimes or episodes) can be questionable from a juridical standpoint, even if there is sound empirical grounding.[30] This

25 See Cath Collins, "Truth-justice-reparations interactions effects in transitional justice practice: the case of 'Valech II' in Chile", *Journal of Latin American Studies,* vol. 49, No. 1 (February 2017), pp. 55–82. 26 This happened in Chile, where lists of acknowledged victims drawn up by truth commissions became the sole qualifier for some reparations. This can create perverse incentives for victims to come forward, or to share particularly sensitive testimony, on the basis of need rather than free choice. Peru offers similar examples surrounding the creation of individual entitlements to reparations for sexual violence. 27 This includes conditional amnesty as an alternative to prosecution, as was supposed to be the case in South Africa. 28 In the Gambia, for example, truth commission testimony by involved third parties led directly to the conviction and sentencing to death of former minister Yankuba Touray. 29 Richard A. Wilson suggests that "trials should remember they are not truth commissions"; the converse also applies. See Richard A. Wilson, *Writing History in International Criminal Trials* (Cambridge, Cambridge University Press, 2011). 30 The truth commission in Peru passed dossiers on a defined number of cases (rather than individuals) to the relevant authorities. The drift toward instead recommending certain people for investigation or prosecution proceeds in part from the tendency, since the work of the Truth and Reconciliation Commission in South Africa, to include person-by-person granting or recommendation of amnesty in truth commission mandates. See, for example, the report of the Truth, Reconciliation and Reparations Commission in the Gambia (2021) and the government white paper published subsequent to that report (2022), available at www.moj.gm/downloads.

does not mean that truth commissions should refrain from naming names, nor that they should replicate standards of due process or thresholds of certainty proper to criminal law if they do so. The issue here concerns the need to address the distinction between establishing individual criminal liability and apportioning ethical, moral and social responsibility – including collective and institutional blame.[31]

c. Leadership

Voluntarism and personalism can be vital catalysts in weakly institutionalized contexts, where exceptionally dedicated, committed or charismatic innovators can achieve results in the gaps left by dysfunctional systems. There is a danger, however, that momentum ceases when the person is sidelined or leaves their post.[32] Personalism can also fuel spoiler tactics – efforts to discredit key figures by tarnishing their professional or personal reputations. Special arrangements may be needed to protect key figures from such bad-faith attacks, but without compromising the necessary safeguards of probity. These arrangements may need to continue after a person has left office, and they may also need to cover family members. Ultimately, however, **institutional underwriting and consolidation of the person's work is the best way to achieve numerous objectives, including diluting incentives for perpetrators to seek impunity through personal threats.**

d. International and regional patterns and incentives

The international and regional context affects how invested a venue State is in being seen to comply with transitional justice duties, including the duty to prosecute. The same context determines which other State(s) and international bodies have influence over the venue State, what costs or rewards the venue State may incur if it disregards international commitments, and the transitional justice context it shares with its neighbours. In Europe, pressure from the European Union and European Union membership conditionality played a substantial role in the eventual arrest and surrender to the International Criminal Tribunal for the Former Yugoslavia of war crimes suspects. Some Western European countries have, by contrast, remained resolutely recalcitrant in the justice dimension of their transitional justice responsibilities,[33] with one Government openly seeking to introduce exceptionally broad provisions tantamount to amnesty and attempting to remove itself from the jurisdiction of the regional human rights court.[34] One bloc of African States tends to be associated with defence of head-of-State immunity and a sceptical stance towards the International Criminal Court on prosecutions, while the African Union transitional justice policy proposes "formal and traditional legal measures", delivered through "primacy

31 See Héctor Olásolo, "Reflections on the need for some degree of harmonization between the international normative framework of ius cogens crimes and transitional justice: special attention to criminal proceedings and truth commissions", in *The Nuremberg Principles in Non-western Societies: A Reflection on their Universality, Legitimacy and Application,* Ronald Slye, ed. (Nuremberg, International Nuremberg Principles Academy, 2015), pp. 112–142, available at www.nurembergacademy.org/fileadmin/media/pdf/publications/The_Nuremberg_Principles_in_Non-western_Societies.pdf. 32 Examples include the leadership of the survivor Dr. Patricio Bustos while he was head of the forensic medical service of Chile between 2007 and 2016, the premature ousting of the Attorney General of Guatemala, Claudia Paz y Paz, who spearheaded the prosecution of key corruption and accountability cases between 2010 and 2014, and the conviction and removal from post of the Spanish judge Baltasar Garzón in 2011, which largely put paid to official efforts to investigate Franco-era crimes in Spain. 33 See A/HRC/27/56/Add.1, A/HRC/34/62/Add.1 and A/HRC/48/60/Add.2. 34 See, for example, OHCHR, "UK: flawed Northern Ireland 'troubles' bill flagrantly contravenes rights obligations, say UN experts", 15 December 2022, available at www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights; and OHCHR, "UK: Rights of victims and survivors should be at centre of legislative efforts to address legacy of Northern Ireland Troubles – Türk", 19 January 2023, available at www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address.

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of national systems".[35] Asia has a more scattered experience, with no regional human rights charter or court and sparse prosecution experiences except for the Extraordinary Chambers in the Courts of Cambodia.[36] Latin America, where the International Criminal Court has no temporal jurisdiction over most transitional justice settings except Colombia, has the most cohesive and explicitly pro-prosecution regional human rights regime.[37]

The potential of regional human rights mechanisms to build and underwrite momentum in the area of transitional justice, including by supporting criminal justice capacity-building and reform, is often overlooked, despite the considerable advantages. These can include greater claims to regional specificity and cultural sensitivity, which is potentially vital for moving forward on accountability for otherwise overlooked violations including sexual and gender-based violence.[38] **The deepening of collaboration between regional actors and other international organizations could enhance the capacity of the former to act as a transmission belt in both directions,** including by contributing to norm development or norm modification in the universal system.[39]

e. Type of transitional justice or transition type

Post-conflict settings present quite different justice contours and dilemmas from other types of transitional justice settings.[40] For example,

35 African Commission on Human and Peoples' Rights, *Study on Transitional Justice and Human and Peoples' Rights in Africa*, paras. 77–78, "Justice and accountability". Paragraph 79 of the study makes reference to regional or international alternatives in case of acknowledged domestic incapacity. No country has yet ratified the African Union's Malabo Protocol mandating an Africa-wide criminal court. There is, however, growing use of subregional entities for accountability purposes, whether specially created (e.g. the Extraordinary African Chambers, where Hissène Habré was tried) or pre-existing (e.g. the Court of Justice of the Economic Community of West African States, which is not, in essence or in origin, a criminal court). 36 A relatively brief and intensely internationally supported transitional justice effort in Sri Lanka seems to have been foundering under the accumulated weight of political reversals and severe economic collapse. The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, "Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka", issued in August 2021 (A/HRC/48/60/Add.2), suggests that, since 2019, investigations have "stalled" and investigators have suffered reprisals. A hybrid tribunal in Timor-Leste produced meagre results. 37 In practice, the post-authoritarian South has many more consolidated domestic prosecutions than post-conflict Andean and Central American countries. 38 For example, Inter-American Court of Human Rights, *Bedoya Lima et al. v. Colombia*, Series C No. 432, 26 August 2021. 39 The inter-American system has had a theme-specific rapporteurship, located within the Inter-American Commission on Human Rights, since 2019. See www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/mvj/default.asp. 40 Settler colonial transitional justice settings rarely include a still-viable prosecution agenda, as was discussed in the introduction. In the Middle East and North Africa, although displaced regimes have undoubtedly been authoritarian in character, corruption and other economic crimes have often been foregrounded. Moreover, these have often been construed as "ordinary" offences rather than human rights offences, pursued, if at all, in a selective manner that does not challenge "crony capitalist" culpability. See Reem Abou-El-Fadl, "Beyond conventional transitional justice", 12 July 2012, available at https://blog.oup.com/2012/07/egypt-arab-spring-transitional-justice/.

post-conflict settings may feature greater involvement of, and dependence on, external actors, including donors and United Nations agencies and missions in situ. Post-conflict settings do not reliably offer short-term formal political replacement, since the successful conclusion of peace negotiations does not necessarily coincide with a new electoral cycle. This potential for high continuity poses obstacles to prosecution if the presiding authorities or their allies are implicated in crimes. These problems can similarly reappear if such actors later return to power,[41] unless the independence of the justice system and/or the political calculus as regards accountability can be improved in the meantime. The challenge is then not solely to create preconditions for accountability, but also to maintain them over time.[42]

f. The type(s), nature and categorization of TJ-relevant violence

State-perpetrated or State-instigated past violence, including at the hands of paramilitaries, is almost inevitably harder to investigate and prosecute in State-only forums, especially where State justice apparatuses were previously complicit in that violence. Restoring or creating objectivity in such apparatuses requires reform in the justice sector and the security services that, even if possible, will likely take decades. This is one reason why even States that actively want to pursue domestic accountability may be tempted to reach for international or hybrid alternatives. International courts try international crimes, however, and to prosecute only core, internationally defined atrocity crimes risks leaving a significant proportion of other crimes unaddressed other than indirectly (such as by prosecuting and punishing the perpetrators who planned, instigated or carried out these crimes for other, internationally defined, offences). Economic, corporate and corruption-related crimes are likely to feature disproportionately among the offences that risk being omitted. Ordinary criminal and civil law forums, however imperfect, may offer the best or the only recourse for addressing these wider classes of harm.[43] They may also offer enhanced opportunities for victims to directly exercise rights to remedy. Therefore, the terms of reference of any special prosecutorial response, whether international, hybrid, or fully domestic, should not exclude other avenues.

g. Economic capacity and resources as real constraints

While economic capacity constraints are not a legitimate reason for States to fail to comply with their international legal and human rights responsibilities, severe resource constraints do exist. Causes may include devastation wrought by conflict, authoritarian plunder, historical injustices, including colonial injustices, or shocks such as the coronavirus disease (COVID-19) pandemic. In such instances, a credible case for concrete, collective societal benefits of justice responses may need to be made if justice for past crimes is not to be perceived as competing with other needs. Merely reasserting the benefits of complying with international duties,

41 Latin America and the Philippines between them offer numerous recent examples of political regression, decades after initial transition. Guatemala demonstrates a precipitous recent dismantling of accountability after a period of modest success. 42 See United Nations Development Programme (UNDP), *From Justice for the Past to Peace and Inclusion for the Future: A Development Approach to Transitional Justice* (New York, 2020), recommendation 1, p. 61. 43 It is still accepted that ordinary forums, even where functional, will never be sufficient either, particularly in post-conflict settings. Ordinary systems may also have statutes of limitation, although it has proved possible to have these limits set aside or to have start dates for their calculation modified to take account of periods of flagrant collusion or dysfunctionality within the justice system.

or pointing toward victims' right to justice as the primary or sufficient justification, risks fuelling resentment on the part of those who feel neglected or disadvantaged. Such resentment can turn popular sentiment against victims or can turn victims groups against one another, particularly if it is instrumentalized by those whose interests are thereby served. Similar risks ensue where, absent a robust public interest case for coherent State policy on justice, a patchwork accountability scenario emerges supported by multiple donors, each with delimited agendas and constituencies of interest. Outsourcing certain aspects of State response to external civil society actors, while superficially attractive for resource-poor or capacity-poor settings, may indirectly introduce or reintroduce dependence on external donors and external expertise, at least during the period of implementation of any associated knowledge or technology transfer.[44]

A vigorous, credible public interest justification for criminal accountability, accompanied by a workable plan to sustainably secure proportionate resources, including domestic resources, should be considered a precondition for prosecutions.[45] The creation of special tribunal responses with international funds needs careful mid- to long-term viability assessment, entailing consideration of likely donor fatigue and of the possibility of domestic political reversal. Where political will at State level fades or is withdrawn, it is relatively easy for resource starvation to sabotage justice efforts that have been made under entirely domestic administration. Special domestic units or mechanisms focused on the prosecution of past crimes can be particularly susceptible, in such circumstances, to being portrayed as a "luxury the country can no longer afford."

2. *STRUCTURAL ISSUES RELEVANT TO CRIMINAL JUSTICE*

a. State configuration, including constitutional arrangements

Overarching State arrangements affect all dimensions of transitional justice. A federally organized State can make it harder for top-down justice reform or transitional justice policy efforts to take root, and federal arrangements may affect special prosecutorial or investigative units in complex ways.[46] On the other hand, federal organization creates multiple points of access to official structures. This may make it easier to create genuinely local transitional justice, which, if successful, can be scaled up. Advocacy to introduce or modify legislation operates differently in parliamentary and presidential systems. In presidential systems, it can sometimes make sense to bypass legislative or indeed public hostility by having

44 Examples include the increasingly prevalent "subcontracting" of transitional justice-related exhumation and identification work to one of a handful of internationally renowned non-State forensic teams. While there can be persuasive immediate justifications related to economies of scale, trust, independence and expertise, long-term dependence can result. Where host States are not bearing the full cost, international donors who support such teams effectively come to subsidise States' ongoing non-fulfilment of related duties. 45 The lessons learned from the ad hoc tribunals for Rwanda and the former Yugoslavia about longevity and follow-up costs should be borne in mind. While the ad hoc tribunals did eventually close, the International Residual Mechanism for Criminal Tribunals, conceived of in 2010 as a "small, temporary and efficient structure", is still in operation, over a decade later, at the time of writing. The proposed budget for the International Residual Mechanism for Criminal Tribunals for 2021 (A/75/383) sets out the various reasons, including the COVID-19 pandemic, why anticipated real-terms reductions in the Mechanism's year-on-year budget had to be postponed. See also www.irmct.org/en. 46 A key actor consulted for Argentina suggested: "In a federal State it makes no sense to try and have special units everywhere. At the same time, the *fiscal de jurisdicción* (local chief prosecutor) has to give consent if the central unit is going to act. With some, there's no point even trying. You just have to work with what you've got."

a willing executive lay the initial groundwork for transitional justice quietly.[47] Entities set up in this way may, however, be vulnerable to reversal through political acts or refusal to approve necessary budget allocations.[48]

The process to appoint or ratify key justice posts, including those of attorney general, public prosecutor or equivalent, can similarly affect the prospects of formal accountability.[49] The ability of a head of State to issue discretionary pardons should not be overlooked, given the possibility of such pardons truncating judicial branch sanction and sentencing regimes.[50]

Whether a country follows a monist or dualist tradition regarding the status that international law enjoys in its internal legal order can also be determinant. This is particularly so in cases of domestic prosecution of past atrocity crimes.[51] The constitutional or even supra-constitutional rank afforded to international law can be more significant for prosecution prospects than the domestic incorporation of international criminal law or international human rights law.[52] Ratification of certain key treaties has nonetheless been significant in resolving non-retroactivity, statutes of limitation and other obstacles to the prosecution of atrocity crimes.[53] However, constitutions can be, or can become, rights-promoting without resorting to specific "downloads" from international law. The constitution making that took place in Latin America in the 1990s, which was deeply imprinted by the region's justice histories, has been particularly progressive around issues of current or potential relevance for transitional justice, including group rights and interculturality (especially the recognition of plurinationalism) in ways that lead rather than follow prevailing interpretations in international human rights law.[54] **Promoting a horizontal exchange of post-transitional State reorganization experiences with the global South, including experiences of constitutional redrafting, can help encourage accountability.**

47 On "quiet" transitional justice approaches to delicate issues, see Lauren Dempster on the setting up by Ireland and the United Kingdom of a bilateral commission to search for Northern Ireland's disappeared. Lauren Dempster, "'Quiet' transitional justice: 'publicness,' trust and legitimacy in the search for the 'disappeared'", *Social and Legal Studies*, vol. 29, No. 2 (April 2020), pp. 246–272, available at https://pure.qub.ac.uk/en/publications/quiet-transitional-justice-publicness-trust-and-legitimacy-in-the. 48 In Paraguay, almost all significant transitional justice infrastructure was created presidentially, some of it under Fernando Lugo, who served from 2008 to 2012. The aspects that best survived a subsequent "palace coup" were those where transitional justice functions had been assigned to existing institutions. In Brazil, the 2019 accession of a denialist anti-accountability President was fatal for many nationwide transitional justice measures and programmes, although some public prosecutor initiatives in individual states, such as São Paulo, were partially insulated. In El Salvador, an authoritarian executive has tolerated the continued existence of a State search commission for adult victims of disappearance, but has starved it of resources as basic as vehicles and fuel. 49 Justice reforms in Chile are widely regarded as having party-politicized Supreme Court and Constitutional Court appointments. At time of writing, the Constitutional Court is under criminal investigation for a series of anti-juridical decisions over transitional justice case sentencing. See Observatorio de Justicia Transicional, *Memory in Times of Cholera: Truth, Justice, Reparations and Guarantees of Non-Repetition for the Crimes of the Chilean Dictatorship*, trans. Cath Collins (Santiago, 2019), pp. 48–56, available at https://derechoshumanos.udp.cl/publicacion/in-english-annual-report-2019-memory-in-times-of-cholera/. 50 On-off proposals by heads of State of Peru to pardon the former President, Alberto Fujimori, have proved one of the most contested aspects of the country's post-conflict accountability trajectory. As at late 2022, all such proposals had been defeated or overturned. 51 This affects whether treaties take direct effect, whether legislative approval is required for ratification and whether courts can enforce treaty law despite executive and legislative objections. See Pierre-Hugues Verdier and Mila Versteeg, "International law in national legal systems: an empirical investigation", *American Journal of International Law,* vol. 109, No. 3 (July 2015), pp. 514–533. 52 Colombia offers one example; Chile, even with its dictatorship-era constitution still in force, offers another. In Colombia, the specific terms of incorporation of the Rome Statute were also significant. See Kai Ambos and Gustavo Cote Barco, "International (criminal) law as applicable law in the Special Jurisdiction for Peace", in *Transitional Justice in Colombia*, Ambos and Peters, eds., pp. 111-134. On forms of incorporation and the possibility of prosecuting international crimes adequately without incorporation, see Werle and Jessberger, *Principles of International Criminal Law*, pp. 182–183. 53 This includes the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had 56 State party signatories as at the end of 2022. 54 See, for example, Rodrigo Uprimny, "The recent transformation of constitutional law in Latin America: trends and challenges", *Texas Law Review,* vol. 89 (June 2011), pp. 1587–1609, available at https://corteidh.or.cr/tablas/r27168.pdf. The post-apartheid constitution of South Africa is similarly progressive on socioeconomic and group rights.

b. Transitional justice and the rule of law

The intersections of the criminal justice system with the rule of law, judicial reform and the security services are transversal, and **the Secretary-General's guidance notes on transitional justice (2010) and on rule of law assistance (2008) accordingly make explicit reference to one another.**[55]

Pádraig McAuliffe (2016) suggests that both transitional justice and the rule of law are adopting increasingly expansive agendas, but he diagnoses too little mutual awareness between transitional justice and rule of law practitioners, even where both are engaged with criminal justice.[56] Elizabeth Andersen makes a pitch for "reframing the principal goal of transitional justice as establishing (or re-establishing) the rule of law".[57] This approach has echoes in the 2008 rule of law guidance note, which describes transitional justice as part of a "framework for strengthening the rule of law". However, this approach could be misconstrued as treating transitional justice as a mere stepping stone to rule of law reform. While strengthening the rule of law will enhance positive outcomes regarding guarantees of non-repetition, this logic risks treating transitional criminal justice as necessary only in States with major rule of law fragility. Such a position allows States that are not usually so identified – mainly Western liberal democracies – to excuse their own non-compliance.

3. *CRIMINAL JUSTICE ARRANGEMENTS, JUSTICE REFORMS AND LEGAL CULTURE*

a. Existing arrangements

Discussion of criminal prosecution within transitional justice frequently concentrates on how to do it better, without addressing whether, why and for what specific ends it should be done at all. Regarding sanctions, for example, it would be relatively easy, even simplistic, to simply reassert the general principles that criminal sanction should be proportionate to the gravity of the offence, and that States are duty bound to avoid both the appearance and the reality of impunity in sentencing. In practice, however, this is one area where the contrast between the needs of post-authoritarian and post-conflict situations can be most evident. Even within one or other of these types of setting, the creation of alternative sanction regimes, restorative justice mechanisms and de jure or de facto amnesty may create a leniency problem with regard to sentencing for ordinary criminal offences. At the other end of the scale, across countries and cultures, some domestic sanction regimes not only contemplate but vigorously pursue whole-life sentences and capital punishment for grave crimes of whatever sort. Others embrace rehabilitative logics that may extend to non-custodial sentencing.

55 United Nations, "Guidance note of the Secretary-General: United Nations approach to transitional justice" (2010), guiding principle 7: "Coordinate transitional justice programmes with the broader rule of law initiatives"; "Guidance note of the Secretary-General: United Nations approach to rule of law assistance" (2008), framework for strengthening the rule of law 5: "Transitional justice processes and mechanisms". Each guidance note has clear connections to Sustainable Development Goal 16, "Peace, justice and strong institutions". 56 Pádraig McAuliffe, "The rule of law's impact on transitional justice: symbol or substance?" in *Research Handbook on Transitional Justice*, Cheryl Lawther, Luke Moffett and Dov Jacobs, eds. (London, Edward Elgar, 2016), p. 76. See also Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Abingdon, United Kingdom, Routledge, 2015). 57 Elizabeth Andersen, "Transitional justice and the rule of law: lessons from the field", *Case Western Reserve Journal of International Law,* vol. 47, No. 1 (2015), p. 308, available at https://scholarlycommons.law.case.edu/jil/vol47/iss1/21/.

Where rehabilitative and restorative logics are invoked regarding the fate and future of individual perpetrators, it should be borne in mind that the "signalling" function of sentencing for grave crimes is one way in which criminal sanctions imposed on individuals acquire general dissuasive and norm-affirming power.[58] This function can be undermined if post-sentencing benefits are subsequently conceded without due consideration. In some long-standing transitional justice settings, public controversy has arisen over the eligibility of atrocity crime perpetrators for executive pardons (see chap. I, sect. B (1) above) and over provision for early release related to old age or infirmity, for instance. Controversy has also arisen over the use of concessionary sentence reduction formulas in late prosecutions – that is, cases taking place many decades after the offences were committed.[59] During the recent COVID-19 pandemic, there was a slew of parole applications or writs of protection from perpetrators who had been sentenced for atrocity crimes in Argentina, Chile and elsewhere.[60]

The question of military court jurisdiction or the use of military or other special facilities for detention is likely to arise, particularly where high-level and State-linked perpetrators are involved.[61] It has been alleged, with some justification, that unjustified pretrial detention[62] was a de facto alternative punishment in some Latin American settings where domestic amnesty provisions were blocking the prospects of conviction.[63] The costs of such tactics in relation to the rule of law and guarantees of non-repetition must be considered, although the flight risk posed by well-resourced and well-connected elite suspects is also a genuine consideration. Any exceptions to ordinary criminal procedure or detention regimes should be carefully considered, to pre-empt the perception or the reality of special treatment or so-called victors' justice.[64] Accession to the Rome Statute of the International Criminal Court provides an opportunity to set out a clear normative and legal basis for exceptions of this sort.

How criminal investigation has hitherto been organized, conducted and resourced is self-evidently central to prospects of accountability, and changes to virtually any parts of the existing criminal justice process have potential ramifications. Particular junctures, such as Rome Statute ratification debates, create obvious opportunities to audit (and, if neces-

58 See communicative theories of punishment as propounded by Antony Duff. Communicative interpretations can help allay fears about the inevitably individualizing nature of prosecution, on which see Karen Engle, "Anti-impunity and the turn to criminal law in human rights", *Cornell Law Review*, vol. 100, issue 5, No. 1069, University of Texas Law, Public Law Research Paper No. UTPUB625 (July 2015), available at https://ssrn.com/abstract=2595677. 59 While it is generally accepted that ordinary statutes of limitation for criminal offences do not apply to some categories of grave crime, some domestic jurisdictions have continued to apply an often shorter limitation period for civil claims, or they have allowed for criminal sentence tariffs to be discounted where the gap between commission and prosecution is long. 60 Such applications were usually made on grounds of belonging to a vulnerable population through age. While outcomes were uneven, public prosecutors and higher courts tended to assert that special protections should be provided within the prison environment rather than through early release. There is greater variation, however, in jurisprudence concerning the automatic entitlement of elderly perpetrators to house arrest and similar conditions, irrespective of the offence. 61 In Peru, Shining Path guerrilla leader Abimael Guzmán was consigned to virtually solitary confinement in a specially constructed underground bunker after being convicted of terror offences. The fear of rescue attempts by followers was cited as a pretext for this arrangement. Although this clearly punitive regime was never relaxed, Alberto Fujimori, the former President of the country, who presided over Guzmán's downfall, was later sent to the same facility when convicted for offences including crimes against humanity. 62 This involves the denial of bail on grounds other than genuine concerns about flight risk, the integrity of evidence or witness safety. 63 Most of these provisions were overturned or interpretively narrowed, via grave crimes category exceptions, from the late 1990s and early 2000s. See Naomi Roht-Arriaza, "After amnesties are gone: Latin American national courts and the contours of the fight against impunity", *Human Rights Quarterly,* vol. 37, No. 2 (May 2015), pp. 341–382. 64 National security exceptions and prisoner safety are regularly invoked, if rarely fully evidenced, by armed forces and security services wishing to retain control over the regimes to which convicted former agents are subjected. In Argentina, an explicit ruling requiring the use of ordinary prison facilities was eventually made. In Chile, separate facilities have been maintained, although some efforts have been made over time to narrow egregious disparities clearly amounting to unwarranted laxity. These efforts included bringing specially built military detention facilities under regular prison service control and regulations, and somewhat improving the transparency of decisions to concede parole or weekend release.

sary, modify) criminal justice arrangements and norms as they apply to core atrocity crimes. However, it is arguably equally necessary for broader system reform to take explicit account of how accountability for past atrocity crimes may be affected, especially as general justice system reform often accompanies or follows political transition or peace process implementation.

The status of domestic criminal justice, including whether it is trusted by victims, perpetrators and society at large, is crucial to accountability prospects. The exact nature of the issues arising is determined by certain general system considerations, such as whether the basic building blocks of criminal investigation have traditionally been entrusted to regular police, judicial police, investigative magistrates or public prosecutors, or how procedural rules treat admissibility, the chain of custody, witness testimony, confessions and requirements for medical, legal or other corroborative scrutiny. These general considerations are all the more potentially sensitive in the case of TJ-relevant violence entailing State responsibility, whether by commission or omission, including through a failure to protect. If those State entities that are usually entrusted with domestic criminal investigation have a history of collusion, wilful inaction or perpetration of crimes, their credibility will self-evidently be correspondingly low. **Without re-founding**[65] **or reform, civic trust and public willingness to engage will be absent, verdicts are unlikely to command respect, and assurances about the protection of witnesses or informants may ring hollow.**

Major sectoral reform is a hugely time-intensive and resource-consuming task, and resorting to alternatives such as a special entity (a special jurisdiction, detective brigade, forensic or prosecutorial unit or tribunal) may require strengthened resources. However, while specialized entities can spread positive reform throughout the wider State apparatus, there is a risk that they may be sidelined, instrumentalized or resented by elements that are resistant to reform or sympathetic to perpetrators.[66]

b. Reforms of domestic justice systems and practices

The reforms that are needed or that would be most useful for the domestic investigation and prosecution of atrocity crimes may not be the same as those that are desirable for justice systems and institutions more broadly. These two goals can even be antagonistic, in whole or in part. Resets of domestic systems can truncate existing paper trails, restart statute-of-limitations clocks or even render inadmissible the testimony and other evidence that has been amassed.[67] For example, the wholesale transformation of the justice system that was attempted in El Salvador during and after the country's internal armed conflict from 1980 to 1992 led to the loss, destruction or abandonment of many accountability-related legal actions and documents lodged under

65 Re-founding did take place with the police in El Salvador and in Northern Ireland. 66 Concern about the potential for special search units to be created to disguise or excuse wider State disengagement was raised among experienced practitioners who gathered in Colombia in 2018 for discussions that later fed in to the Guiding Principles for the Search for Disappeared Persons (CED/C/7). Cath Collins showed that, while domestic investigation and prosecution of grave crimes including disappearance can contribute to institution-wide learning regarding treatment of victims, investigative ingenuity, familiarity with international law and forensic awareness, for instance, such linkages are not automatic. Cath Collins, "Transitional justice from within: police, forensic and legal actors searching for Chile's disappeared", *Journal of Human Rights Practice,* vol. 10, No. 1 (May 2018), pp. 19–39, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048958. 67 Conversion from written inquisitorial to oral adversarial criminal procedure may rule out further use of previously admissible evidence, such as sworn testimony from witnesses since deceased and no longer available to be cross-examined in court. Various Latin American countries have suffered significantly from variations of this problem, with transitional justice caseloads sometimes split across old and new systems.

the old system. Any wholesale replacement of criminal codes and/or procedural codes will probably lead defendants to launch non-retroactivity and most-favourable-law challenges. The likely impact of reform must therefore be carefully considered.[68] Even so, some attrition in the capacity of reformed systems to deliver convictions for past offences may need to be accepted as the price of protecting defendants' rights.[69]

Prosecutorial capacity must be specifically scrutinized for its impact on the prospects for bringing transitional justice-related cases. Transferring investigative discretion from the magistrature into the hands of a public prosecutor is not an automatic recipe for progress in accountability: it simply creates a new potential gatekeeper.[70] The same applies to other functions, including investigation, evidence gathering and the enforcement of warrants, orders and sentences by the police and prison services. Various case actors who were consulted reported that **some new prosecutorial entities or functions had found it hard to assert their authority.** State institutions associated with past perpetration, including the armed forces and security services, seem particularly inclined to question the credentials and enforcement powers of a new structure. The potential for personnel who are sympathetic to impunity or susceptible to pressure by perpetrators to obstruct investigations may be heightened by the long and complex investigations into system crimes, during which there may be multiple opportunities to disrupt chains of evidence or to destroy or "misplace" artefacts or documents.[71] In sum, while vetting, lustration, the creation of new entities and generational cohort replacement may all help create a "clean hands" break between past and present, the gains may be offset by depletions of operating capacity, experiential knowledge and usability of evidence.[72]

If reforms to justice systems are framed as being motivated by a rationale of modernization or efficiency, rather than specifically as being intended to promote accountability, this may reduce the level of friction. The creation of ringfenced special units for atrocity investigations may be seen as a way to insulate such investigations from wider system demands,[73] and these units may serve as a tool for creating specialist expertise.[74] Where yesterday's perpetrators of atrocity crimes have become today's macrocriminal kingpins, addressing both kinds of activity can help benefit the public interest. In Guatemala, for example, a "high-risk court" system and an associated special prosecutorial unit

68 Pre-transition case outcomes may also need scrutinizing, with complex res judicata (preclusion) matters arising if investigations are reopened. 69 On how the dismantling of emergency provisions, including the non-jury trial, affected prosecution prospects in Northern Ireland, see Denis Boyd and Sean Doran, "The viability of prosecution based on historical enquiry: observations of counsel on potential evidential difficulties" (October 2006), available at https://cain.ulster.ac.uk/victims/docs/group/htr/boyd_doran_1006.pdf. 70 In settings including El Salvador and Paraguay, the person at the apex of this new system resolutely blocked prosecution for many years. 71 Advantageous change can also occur, such as breakthroughs in digital or other forensic and investigative technologies, or the declassification of incriminatory documents in the venue jurisdiction or elsewhere. 72 Examples include Germany, where a ban on hiring previous Stasi secret police operatives and on allowing them to assist in decoding the organization's surveillance archives significantly impeded initial understanding of its encryption systems. See Collins, "Transitional justice from within", for differential age and cohort effects on victims' perceptions of the credibility and trustworthiness of State transitional justice-related case operatives. 73 See, for example, International Center for Transitional Justice, *Gearing Up the Fight Against Impunity: Dedicated Investigative and Prosecutorial Capacities* (Foundation for Human Rights South Africa and International Center for Transitional Justice, 2022), available at www.ictj.org/node/35041: specialized prosecutorial units "should be truly dedicated and focus exclusively on their mandated crimes without being deflected by other demands on their time and resources." 74 Opinions differ in Chile as to whether the rotation of specialized human rights detectives into and out of the dedicated past crimes brigade was intended primarily to enhance system learning or to slow the progress of cases. The entrusting of an entirely new caseload, related to post-2018 police repression of mass protests, to the same brigade can similarly be interpreted in diametrically opposed ways, but it has certainly placed additional structural strain on the brigade, due to the need to work across two criminal justice systems: pre-reform for dictatorship-era cases and post-reform for the protest-related caseload.

were mandated to tackle ongoing large-scale corruption and organized crime alongside past conflict-related atrocity crimes. An authoritative source suggested that there was a high coincidence of defendants across the two categories, noting that the dual agenda allowed the prosecutorial unit enhanced access to crucial intelligence from authorities in the United States and other external sources. These agencies were, it is argued, more willing to cooperate because of their express interest in suppressing the suspects' ongoing trafficking activities. However, this could, and in practice did, expose the past crimes unit to additional perpetrator-driven pressure for closure or suppression.

Units of this sort need dedicated security arrangements and protection for personnel, data and infrastructure. Where the political environment is particularly hostile, they may merit special appointment, tenure and oversight arrangements, amounting to a type of limited immunity. There is also a need to consider the risks, including to victims and witnesses, posed by potential future authoritarian reversion, which could lead to the capture of sensitive data amassed by such units.[75] Similar considerations have led, for example, to the investigative archives of truth commissions being lodged outside of the venue jurisdiction, and to collaborations with private foundations, universities and other research centres in other countries. The legal and political pitfalls of these arrangements must be carefully considered. In particular, the United Nations has not, to the author's knowledge, successfully resolved the conundrum of investigative access to, and ownership of, the archive of the truth commission in El Salvador.[76] A recent State offensive against a former police archive in Guatemala included threats to prosecute both former archive staff and outside entities over projects by which digital back-up documents were lodged with the Government of Switzerland and a university department in the United States.[77] These considerations also apply to biometric data and DNA sampling undertaken for the purposes of identification of the dead or disappeared, sometimes by private foundations or philanthropic entities, which may be trusted by victims or relatives but are fundamentally unaccountable. **Solutions may be sought through greater recourse to intergovernmental entities (such as the regional human rights commissions and courts or the International Committee of the Red Cross (ICRC)) as good-faith guarantors or custodians, but obstacles will remain, including resource constraints and vulnerability to political control.**


OHCHR photo

75 A 2022 Human Rights Watch report highlights the dangers posed by the Taliban's capture of biometric data collected for purportedly humanitarian purposes in Afghanistan. See www.hrw.org/news/2022/03/30/new-evidence-biometric-data-systems-imperil-afghans. 76 The truth commission archive came to be lodged in the United Nations Headquarters building in New York after fears and threats of violence forced the commission to relocate its activities and information outside of El Salvador. See Ulster University, "The uses of truth: truth commission archives, justice and the search for the disappeared in El Salvador", rapporteur document (April 2018), available via www.ulster.ac.uk. 77 See https://nsarchive.gwu.edu/news/guatemala/2019-05-30/imminent-threat-guatemalas-historical-archive-national-police-ahpn.

c. Training

Training and similar interventions are routinely suggested as a way to reform institutional culture. **Informants consulted for the present paper were almost uniformly sceptical, however, as to the applicability and longevity of impact of much of the top-down, norm-focused training they had received, witnessed or taken part in – much of it sporadic.** More tailoring of programmes and protocols, ideally toward nationally designed, nationally delivered or at least nationally informed versions, was recommended almost universally. The author took part in co-designed training that approached mid-level employees in the State justice system as active transitional justice problem solvers, inviting them to identify lived experiences of encountering and resolving tensions or trade-offs between truth, justice and reparation, before exploring how international norms, protocols or peers in other settings had approached similar dilemmas. Recommendations drawing on these and other experiences include the following:

- Content related to transitional justice, international criminal law and international criminal justice should be specifically incorporated into basic training or induction in all institutions within and related to the justice system, repeated with each new intake or cohort.

- A training cycle should be devised, allowing for subsequent revisiting, reflection and peer-to-peer replication of experiences, to enhance credibility and take-up.

- States' holistic transitional justice responsibilities (referring to the interrelated nature of truth, justice, reparation and duties relating to guarantees of non-repetition) should be emphasized in all training, whateve the institution's specific function.[78]

- Justice-focused training should take a whole-system approach, addressing all relevant parties including judicial, prison service, prosecutorial and police personnel, forensic and criminalistics experts, the security services and armed forces personnel, as well as those providing social and psychological support, civil administrators, court ushers and civil society organisations supporting witnesses and those pursuing cases.

- Training should be designed (where safety and ethics allow) by teams including insiders from the relevant sector, institution or profession.

- Sector-specific training should be complemented, where possible, with cross-sectorial activities enhancing mutual understanding of different institutions' functions.

- Training should be designed and/or co-delivered (where safety and ethics allow) with victims associations or others with relevant lived experience.

- Personnel engaged in specific transitional justice functions (e.g. reparations programme teams, truth commission staff

78 This recommendation reinforces the message that all aspects of due remedy can be made with reparatory effect, depending, to a great extent, on how State functionaries conduct themselves as much as on what they do.

and the staff of institutions operating under the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris principles)) should be regularly invited to train or raise awareness among personnel in the regular justice system.

- Training should be provided on sexual and gender-based violence and on countering gender bias and stigma related to sexual and gender-based violence in justice systems.

- Training should be provided on survivor-centred and participatory approaches, trauma-informed interviewing etc.

- Appropriate diversity of trainers should be ensured, according to gender and other applicable considerations.

- Knowledge of international criminal justice and/or transitional justice should be incorporated into training for future justice professionals (e.g. through law schools, bar associations and magistrates associations).

- The provision of training initiatives on transitional justice should reach beyond the legal professions to cover social work, health and life sciences, politics and public administration, data management and the forensic disciplines.

- Technical cooperation funds and national scholarship programmes should be noted as valuable sources.

- Plans and programmes for public sector reform should include the remediation of skills deficits.

- Consideration should be given to how lawmakers and drafters might also benefit from training, e.g. through contact with parliamentary committees or civil servants or researchers in relevant ministries.

- In-service training should be periodically repeated, at a minimum with each new intake cohort.

- Content relevant to transitional justice should be included in regular induction programmes.

- Opportunities should be created to incorporate civil society experts, including experts by lived experience, and members of victims and survivors organizations, including women-led organizations and associations, while exercising due care to avoid secondary victimization.

- It should be noted that the promotion of participation in regional and international training opportunities can have secondary benefits in providing key actors with State accountability with networks of reference and sources of positive professional validation.[79]

79 See, for example, a recent joint initiative involving the European Judicial Training Network headed "Joint Training on the Investigation and Prosecution of Core International Crimes", which was hosted by the International Nuremberg Principles Academy in June 2022.

B. Areas particularly recommended for the focus and practice of the United Nations

The 2020 report of the United Nations Development Programme (UNDP) on development and transitional justice notes that **the United Nations is "uniquely placed for capacity and independence building in the justice sector" and is often on the spot when Governments are considering national prosecutions of core international crimes.**[80] United Nations practitioners and advisers might continue to make use of this positioning. This may imply, for example:

- Keeping in view recommendation 3 of the development approach of UNDP to transitional justice, which advocates "a consistent focus on building national capacity."[81]

- Considering the broader domestic rule of law capacity linkages and implications of decision-making in international criminal justice.

- Looking beyond international core crimes and international law in positively valuing prosecutorial or quasi-prosecutorial justice responses in domestic settings.

- Assisting States in accessing realistic assessments of international and comparative experiences of hybridization, completion strategies and other special jurisdictional design formats, to inform realistic choices around replication, complementation or a preference for ordinary domestic proceedings, with or without community-level alternatives including traditional alternatives.

- Encouraging and/or initiating active discussion with regional and subregional organizations that may contribute venues, norms or personnel to domestic justice processes.

- Encouraging a realistic assessment of budgetary constraints when assessing the viability, sustainability and legacy potential of special proceedings, including consideration of witness protection, appeals, preservation of evidence and archive challenges.[82]

- Acknowledging the potential utility and legitimacy of alternative or parallel systems and sanctions.

80 UNDP, *From Justice for the Past to Peace and Inclusion for the Future*, p. 38. 81 Ibid., p. 61. 82 Such considerations were often neglected in the first generation of hybrid court proceedings. See, for example, newsletter No. 164 of the Section on Human Rights and Archives of the International Council on Archives (February 2022), regarding what it calls the "shameful" end of the Extraordinary Chambers in the Courts of Cambodia and the associated uncertainty about the fate and public accessibility of more than a decade of accumulated evidence, preliminary findings and rulings in the Chambers' remaining two cases, which were abandoned (quashed).

- Helping to construct clearer boundaries for amnesties and amnesty-like measures.

The issue of amnesty is a difficult one to address, with particular dilemmas around the deferral provisions such as those set out in article 53 of the Rome Statute (interests-of-justice deferral). Practice at regional human rights systems level is diverse and has changed over time: the inter-American human rights system has moved from a focus on legitimacy toward a more uniformly condemnatory stance, while the European Court of Human Rights remains generally more deferential to State discretion.[83] Equally live dilemmas exist at the domestic level in transitional justice contexts.[84] These dilemmas have a quite different shape in post-conflict settings as opposed to post-authoritarian or post-totalitarian ones. Differences include the relative prevalence of violence during widespread conflict, the need to negotiate and secure not only peace but subsequent disarmament, and even the existence of an international legal norm that explicitly encourages the adoption of amnesty where an armed conflict can thereby be brought more swiftly to an end.[85] These distinctions arguably create a different tenor to the boundaries between legitimate conditionality and legally and ethically questionable self-amnesty – or between justifiable or tolerable leniency and unacceptable impunity.[86]

1. *AREAS FOR POSSIBLE ENGAGEMENT BY UNITED NATIONS OFFICES, STAFF AND ADVISERS*

a. Encouraging, valuing and responding to victim participation

The United Nations emphasizes the importance of active victim participation in transitional justice processes. In 2022, UNDP and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) further emphasized the need to specifically promote the meaningful participation of women, including women survivors and victims.[87] **Victims are experts in many senses, including through lived experience:** many have had to shoulder both their own burdens and those of the State for far too long. That said, victims and State actors in existing settings have at times co-created pioneering "accountability enclaves" in the face of wide-spread social indifference or even hostility. Accordingly, the value of cross-sector and cross-service dialogue is incalculable, difficult though it might be to

83 The European Court of Human Rights, however, increasingly questions member States' justifications, partly influenced by the practice of the inter-American human rights system. See Juan Pablo Pérez León Acevedo, "The Europe-an Court of Human Rights (ECtHR) vis-à-vis amnesties and pardons: factors concerning or affecting the degree of ECtHR's deference to states", *International Journal of Human Rights*, vol. 26, No. 6 (February 2022), pp. 1107–1137, available at https://doi.org/10.1080/13642987.2022.2027761. For the position regarding the inter-American human rights system, see Louise Mallinder, "The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws", *International and Comparative Law Quarterly*, vol. 65, issue 3 (July 2016), pp. 645–668, available at https://pure.qub.ac.uk/en/publications/the-end-of-amnesty-or-regional-overreach-interpreting-the-erosion. 84 Post-conflict examples include Northern Ireland, which instituted maximum two-year jail terms for those convicted during the post-1998 peace accord period of previous conflict-related terrorism offences. Core international crime categories were not explicitly utilized. Those already in prison were released on licence, while fugitives from justice were quietly given written assurances that they were "no longer actively being sought" for prosecution. These so-called on-the-run letters came to light in 2014. The resultant public outcry pushed some political parties involved in the peace deal to issue barely credible statements disavowing all prior knowledge of them. The use of "alternative" sentencing, including non-custodial sentences, even for core crime categories, is one of the more controversial aspects of the mandate of JEP in Colombia. 85 Protocol II Additional to the Geneva Conventions of 1949, article 6 (5). 86 See, in general, *The Belfast Guidelines on Amnesty and Accountability*, available at www.ulster.ac.uk/transitional-justice-institute/our-research/past-projects/belfast-guidelines-on-amnesty-and-accountability, and extensive comparative work by Louise Mallinder, exposing, inter alia, the continued deployment of amnesty and amnesty-like mechanisms, and the considerable slippage and lack of clarity in surrounding legal praxis, including in international law. 87 UNDP and UN-Women, *Women's Meaningful Participation in Transitional Justice: Advancing Gender Equality and Building Sustainable Peace* (New York, 2022), available at www.unwomen.org/sites/default/files/2022-03/Research-paper-Womens-meaningful-participation-in-transitional-justice-en.pdf.

sustain. Hard-to-reach victims, in particular, should be actively sought out and listened to respectfully. Victim participation in formal justice processes can sometimes be unfamiliar or resisted due to concerns about due process and neutrality. A particular manifestation of this concern – and the most understandable one – may arise in transitional justice contexts involving complex cases or implicated victims. Nonetheless, crimes of relevance to transitional justice, while painfully personal, are at the same time innately systemic. Thus, even if and where distance needs to be preserved between particular victims and specific cases, there is plenty of scope for shared endeavour between the victim sector as a whole and the justice system, whose job it is to make it possible for cases to proceed. If this initial shared project to reforge the very possibility of justice is done well, it can be reparatory in any number of ways; denied, or done badly, it may make a stone of the heart.

b. Acknowledging and amplifying justice demands from below

This undertaking requires active listening to hear what appetite for justice exists in different social sectors, how weak or strong demand for prosecution is, and what legitimate concerns may exist, particularly among directly affected and structurally vulnerable groups, about the costs and implications. In this way, **the strength or weakness of social support for formal justice alongside other transitional justice needs can be accurately assessed.** This includes paying due attention to anti-prosecution sentiment, whatever its source(s). Where appetite for formal justice is lacking, or fatalism about its prospects predominates, it may be useful to point out the links between justice for past crimes and other things that people value.[88] Globalization, migration and conflict-related displacement mean that justice-relevant sentiments and demands may also be found outside the borders of the venue State. Diaspora populations, including refugee populations, increasingly drive transitional justice agendas, through home-country, third-country or regional criminal or civil cases and by lobbying for further advances in truth, reparations and search, sometimes on an intergenerational harm basis. On occasion, perpetrators have been identified and denounced while living anonymously or under assumed identities among ex-patriate communities. This issue of fugitive perpetrators raises the question of a potentially proactive role for the Office of the United Nations High Commissioner for Refugees, given its close contacts with refugee populations.[89] It is important, however, that the legitimate desire to locate the perpetrators of atrocity crimes is not misappropriated to justify unduly onerous surveillance or screening of migrants or persons wishing to claim refuge.

c. Facilitating (self-)advocacy

Further encouragement of existing self-advocacy and self-empowerment could be undertaken, including through the provision of legal literacy inputs and support for wider access to justice, helping to demystify the legal process.[90] If support from the United Nations for advanced human capital development in State justice in-

88 See, for example, the direct connections between past anti-impunity sentiment and current anti-corruption agendas in Guatemala, described above. 89 Such a role could be played, for example, in furtherance of the objective of the International Residual Mechanism for Criminal Tribunals to trace and detain a small group of fugitives still wanted under indictments issued by the International Criminal Tribunal for Rwanda. See www.irmct.org/en/cases/searching-fugitives. 90 Such support could be preferentially offered to members and leaders of traditionally marginalized groups, including women, children and young people, LGBTIQ+ people and people with disabilities.

stitutions was matched with the equivalent enhancement of legal mobilization capacity in civil society organizations, this could help achieve "equality of arms" in the legal process. Numerous positive examples exist, including an innovative programme, co-designed by a university institute in Peru and an Ayacucho-based relatives association, almost exclusively women-led. The programme enhanced the capacity of the association to engage with the State mechanism dedicated to the search for the disappeared.[91] **Initiatives to make psychosocial support available to survivors and to enhance community economic opportunities have led to the subsequent emergence of victim- and survivor-led movements for justice, including among survivors of sexual and gender-based violence.**[92]

UN Photo/Victoria Hazou

United Nations offices and agencies may also undertake:

(a) "Placeholding" advocacy (i.e. advocacy that seeks to preserve space for future justice possibilities), including by:

(i) Reviewing peace agreement texts, the mandates of United Nations missions and proposed transitional justice legislation, plans or programmes for compliance with international crimes obligations;

(ii) Engaging with relevant actors to ensure that the mandates of truth commissions include legal, budgetary and normative provision for the preservation, storage and future use of archives and testimony, with explicit reference to accessing the justice system, evidentiary status, legal ownership and custodianship, and access and privacy for sensitive content (e.g. detailed testimony on sexual and gender-based violence or involving minors);

(iii) Ensuring that reform-focused policy discussions, including those themed around guarantees of non-repetition, explicitly consider the need to create environments that help foster prosecution;

(iv) Promoting search mechanisms for the disappeared that do not contemplate anti-juridical measures or impose unnecessary limits on prosecution in the name of so-called "humanitarian" goals;

91 The programme covered relevant legal and scientific topics but was also geared toward enhancing the association's capacity to autonomously generate and administer funded projects, including through income generation. 92 See Susana SáCouto, Alysson Ford Ouoba and Claudia Martin, *Documenting Good Practice on Accountability for Conflict-Related Sexual Violence: The Sepur Zarco Case* (New York, UN-Women and American University, 2022), available at https://www.unwomen.org/en/digital-library/publications/2022/05/research-paper-documenting-good-practice-on-accountability-for-conflict-related-sexual-violence-sepur-zarco.

(v) Cultivating political will for accountability for atrocity crimes among key political and justice actors[93] by means of diplomacy behind closed doors and/or public exhortation;

(vi) Helping to preserve civic space for autonomous associative activity;

(b) Enabling-environment advocacy (i.e. advocacy whose aims include to catalyse preconditions for justice), including by:

(i) Ensuring joined-up advocacy across all United Nations agencies operating in a particular setting and promoting basic literacy in transitional justice, and common messaging on justice, across United Nations activities;

(ii) Acting as a good-faith guarantor, where relevant, for interactions between victims and authorities over matters related to transitional justice;[94]

(iii) Utilizing all United Nations engagements and programmes, including initiatives with traditionally marginalized populations, to promote awareness of the transitional justice agenda and to actively gauge priorities and perceptions of justice;

(iv) Promoting familiarization, adaptation and use of relevant international protocols and standards;[95]

(v) Engaging with key domestic justice stakeholders aside from the State (e.g. bar associations and magistrates associations) to make or strengthen a consistent rule of law case for prosecutions and other appropriate justice responses;

(vi) Where trials are imminent or pending, facilitating community participation, where possible and appropriate, in raising awareness among trial and courtroom personnel regarding cultural, linguistic and other considerations likely to arise; once trials begin, supporting community associations to attend and monitor the trials;

(vii) Actively facilitating and widely publicizing calls for submissions by United Nations bodies in areas of relevance for transitional justice, and encouraging, advising or assisting civil society organisations (including victims associations, if appropriate) to participate actively in reporting and consultation processes, including through the submission of alternative reports, when venue States' universal periodic review or relevant treaty reporting obligations fall due;

(viii) Promoting, convening or joining periodic public and high-level discussions, in academic or other suitable forums, of outcomes and recommendations of universal periodic review and treaty monitoring mechanisms and processes, regional

93 Actors operating within domestic justice systems interviewed for this paper named political will in the executive and administrative branches of State as the single most significant variable affecting the success or failure of their own actions within the justice environment, while at the same time deeming this variable to be the one they had least power to influence, sometimes viewing it as inappropriate or illegitimate to attempt to influence it. The potential influence of external entities such as the United Nations accordingly takes on greater importance. 94 In Chile, for example, OHCHR played a role in auditing and minuting round-table meetings between survivors associations and government representatives over outstanding justice and reparations demands. 95 These include the Minnesota, Istanbul and Berkeley protocols and the Guiding Principles for the Search for Disappeared Persons. User feedback on the usability and adequacy of these protocols and principles could be sought and collated to stimulate increased groundedness, diversity and participation in future iterations.

or universal human rights system country visits, missions, etc.;

(ix) Encouraging applications for United Nations voluntary funds, where appropriate, for successful implementation of recommendations and obligations;[96]

(x) Encouraging States to apply to United Nations committees and working groups and to proactively utilize the advisory jurisdiction functions of regional human rights mechanisms, where applicable, in order to obtain technical assistance for devising compliance plans or new public policy initiatives for transitional justice.

d. Encouraging structural reform with a focus on justice capacity[97]

- Considering transitional justice issues in all United Nations engagements with security sector training and reform and actively following up on vetting proposals or recommendations for general reform, for example those made in truth commission reports.

- Encouraging active discussion of the abolition or curtailment of parallel systems of military justice or, at a minimum, restricting the competence of bodies operating under such systems to crimes committed in the performance of military duties.

- Encouraging armed forces and security services in post-conflict and post-authoritarian settings to consider the likely negative implications of institutional non-cooperation with domestic atrocity crime investigations for future deployment to United Nations missions.

- Considering the introduction or strengthening of investigative capacity specifically tailored to addressing complex crimes, including those involving sexual and gender-based violence, as part of policing reforms.

- Supporting the development of robust, quality-assured national forensic capacity, where appropriate, including in relation to evidence of survived torture and sexual and gender-based violence.[98]

- Ensuring that justice reform proposals take explicit account of the likely impact of suggested reforms on existing or future cases related to transitional justice, as discussed above (see chap. I, sect. C).

- Proposing the strengthening of independent appointment, performance review and promotion processes and/or the introductionof specific tenure and disciplinary procedure arrangements and protections, e.g. for prosecutors, judges and police investigators.

- Promoting the introduction or adoption of international criminal law norms and standards and legal provisions around sexual and gender-based violence, enforced dis-

96 These include the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review and the Voluntary Fund for Technical Cooperation in the Field of Human Rights. 97 See also chap. I, sect. C. 98 See A/HRC/50/34, especially at para. 100, for relevant considerations. It should be borne in mind that the development of fully autonomous capacity for tasks such as the search and identification of the disappeared may be prohibitively expensive. Where the relative domestic incidence of such crimes is low, it can therefore make sense to "buy in" external expertise or laboratory capacity (but see chap. I, sect. A (7).

appearance and other core components of atrocity crimes that may be absent from, or inadequately or perversely addressed by, existing domestic criminal law and practice (while bearing in mind that legality and the principle of the most favourable law may restrict the post hoc applicability of such changes).

e. Promoting and supporting the role of national human rights institutions[99]

- Encouraging national human rights institutions to actively engage with transitional justice matters by monitoring and reporting progress on the investigation of atrocity crimes, proposing or participating in alternative scrutiny mechanisms for judicial and prosecutorial appointments, producing white papers to inform and stimulate legislative reform or innovation, etc.

- Recommending that national human rights institutions take on custodianship responsibilities for truth commission archives and follow-up.

- Promoting the designation of national human rights institutions as national mechanisms for implementation, reporting and follow-up, under the terms of reference proposed by the Human Rights Council.[100]

2. *INVESTIGATIVE, PROSECUTORIAL AND FORENSIC ISSUES*

Investigation of human rights violations can take a number of forms, according to the purposes of the investigation and the actor undertaking it. Investigation in relation to prosecution refers to the application of particular techniques and methods that are deemed lawful, available and appropriate for producing evidence that can be used to prove elements of a crime, allowing a court to adjudicate responsibility for them.

a. Structuring of prosecutions

This subsection and the subsection that follows (2: "Investigations: obtaining and handling evidence") are closely informed by conversations with participants involved with cases that are current at the time of writing. The vantage point adopted is that of a prosecutorial or special investigative entity or office (such as a police body) in relation to the domestic courts.

One preliminary observation that should be underlined is the need for a whole system focus, anticipating from the outset matters that will arise along the entire chain of investigation, adjudication, sanction, imprisonment and release.[101] A second preliminary observation is that **a holistic transitional justice focus should always consider formal justice with due regard for its intersection with other dimensions of transitional justice[102] and for the participation rights of social actors, in-**

99 This may include other manifestations of State human rights infrastructure, such as human rights or police ombudspersons. 100 See A/HRC/50/64. 101 UNDP, *From Justice for the Past to Peace and Inclusion for the Future*, p. 61. Effective prosecutions depend largely on "the level of functioning of the entire justice chain". 102 For instance, pursuing a civil claim can be understood as an alternative, judicial route to reparations. While civil remedies may present particular challenges for authorities, including concerns over resources, if claims are directed against the State, this places the spotlight on the collective or systemic nature of perpetration while extending the temporal possibilities for redress beyond the biological lifespan of individual perpetrators. It also offers a way for victims to seek direct redress against private and corporate perpetrators of harms that are otherwise difficult to prosecute, including across jurisdictions.

cluding victims groups and their allies.[103] An assessment of the space that justice structures afford civil society actors so that they may exercise due influence can be a useful first step. Although some systems limit the role of victims to that of "mere" petitioners, witnesses or sources of information, this is not invariably the case, and change, including through exceptions, can be engineered.[104]

i. Finding a starting point

Domestic prosecution in venue States is not limited to pursuing categories of core atrocity crime as defined in international criminal law. Such prosecutions can pursue criminal responsibility and/or civil liability for a wider range of crimes under applicable ordinary domestic law and codes.[105] **State-initiated prosecutions that begin in this way, with a small number of relatively achievable cases, can help build public confidence and generate judicial truths that can act as a springboard for later cases.** Domestic criminal law may even offer better prospects than current international criminal law for pursuing some newer understandings of transitional justice-related harm, including environmental harm, violations of economic, social and cultural rights, and corporate crime.[106] Violent offences, including terror offences, may also be pursued via domestic codes, although restraint may be called for in respecting the terms of peace accords. Such restraint might include acknowledging the potential validity of amnesty (particularly if appropriately limited), or of lenient special sanction regimes for certain classes of offence. It might also include awareness of the need for particular care when invoking charges or theories of participation such as incitement or aiding and abetting. While the use of such legal concepts and theories can potentially contribute to truth and to guarantees of non-repetition, as well as assisting justice, there is potential for politicized misuse.[107]

Invocation of domestic laws criminalizing homicide, kidnapping and the like can offer an initial way forward, allowing jurisdictions to avoid or defer encounter with debates on legality, evidentiary thresholds, specific criminalization of sexual and gender-based violence, and complex theories of participation,[108] **which are often required for international crime convictions *sensu stricto*.** Although the approach based on existing domestic crimes will tend to skew initial caseloads toward physical integrity crimes and their immediate

103 These actors may have long experience of legal mobilization, making them repositories of considerable accumulated wisdom as to what is possible and where the "pinch points" of the existing system lie. On legal mobilization in authoritarian settings, see Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge, Cambridge University Press, 2009); the multiple works of Austin Sarat and Stuart Scheingold on the concept of "cause lawyering"; and the international Lawyers, Conflict and Transition research project, reported at https://lawyersconflictandtransition.org/. **104** In Chile, existing provision allowing direct victims of crime or immediate family members to trigger investigations and act as full parties to proceedings was gradually expanded to allow relatives associations to exercise the same powers. In the Gambia, by contrast, victims have no direct access to the criminal justice process. In the view of one expert, the preference of some victims for actions before the ECOWAS regional court, the Community Court of Justice, which can produce tangible reparations outcomes, is a direct result of this structural particularity. At domestic level, this has informed a leaning toward a hybrid model for a proposed war crimes tribunal, since this could be moulded to admit direct victim representation. **105** On the notion of "using the law you have", see chap. II, sect. B (1) (g) below. **106** State-initiated criminal action against corporate actors in transitional justice settings is becoming more prevalent, although convictions have been rare. See Cath Collins, ed., and Nelson Camilo Sanchez, *Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America: The cases of Colombia, Guatemala, and Argentina* (Belfast, Ulster University School of Law, 2021), pp. 39–46. **107** While prosecutions under domestic incitement are sometimes clearly warranted (e.g. the Rwanda "media case"), prosecutions under domestic incitement, anti-terror, and even historical memory laws have been weaponized by illiberal post-transitional authorities in Hungary, Peru and Poland. See, for example, Andrea Pető, "The illiberal memory politics in Hungary", *Journal of Genocide Research*, vol. 24, issue 2, pp. 241–249, available at doi.org/10.1080/14623528.2021.1968150. **108** Examples include joint criminal enterprise and versions of control theory (perpetration through an organization).

perpetrators, who may be relatively low-level actors, charges for collaboration, conspiracy and other forms of secondary participation can allow prosecutors to move up the chain of command.[109] Prosecution of low-level perpetrators can also offer some prospect of exploring the fine-grained truth about individual victims and their fates, which is often valued by relatives and other communities of reference and is rarely forthcoming in large-scale trials of command figures.

No stratagem will be realistic everywhere, and domestic law may be particularly deficient in certain settings.[110] Sabine Michalowski and Juan Pablo Cardona Chaves refer to the "challenges that arise if transitional justice measures… create a specific legal framework, outside of the ordinary justice systems, only for a limited group of primary perpetrators".[111] **Approaches relying on what currently exists at least offer an alternative to the potentially onerous or unrealistic requirement to set up new structures, norms or mandates.** Other answers to the dilemma of where to start may include combining repertoires so that formal, retributive proceedings sit alongside traditional (or neo-traditional), partly restorative programmes. Rwanda is one commonly referenced example; Colombia is another. While neither is without difficulties or criticisms, this is true of all models. Some countries currently debating hybrid transitional justice prosecution arrangements, including the creation of dedicated hybrid courts together with or within the Court of Justice of the Economic Community of West African States, are experienced in operating concurrent jurisdictions for other matters.[112] There are pitfalls in multiple concurrent accountability actions, however, including the risk of instituting separate and unequal treatment. While the rights-guaranteeing capacity of each alternative must of course be audited, if the ability to address collective rights and violations of economic, social and cultural rights is taken into account, alternative or complementary forms of justice and redress may have much to offer.[113]

ii. Clarifying the specific purposes of prosecution at home

An imperative to prosecute can be derived from positive international law obligations, from victim-centred needs or rights, from the collective (national) interest, or from invocations of the common good of humanity. The ends served differ in each case.[114] A transitional justice approach, as distinct from an international criminal justice approach, will certainly support accountability, but could

109 One experienced source expressed this approach as "being realistic about modes of participation … going for co-perpetration, aiding and abetting, whatever you can most reliably prove". 110 Regime legacies may include spurious past convictions of regime opponents, indicating that urgent review is required. 111 Sabine Michalowski and Juan Pablo Cardona Chaves, "Responsabilidad corporativa y justicia transicional", *Anuario de Derechos Humanos,* Universidad de Chile, vol. 11 (2015), p. 173. 112 These countries include the Gambia, which, like other West African States, operates a tripartite legal system, with common-law, customary law and sharia law components. The African Union transitional justice policy document (African Commission on Human and Peoples' Rights, *Study on Transitional Justice and Human and Peoples' Rights in Africa)* specifically recommends the exploration of customary and traditional justice alternatives. 113 The Bangsamoro transitional justice framework in the Philippines has no prosecution component. However, it contemplates compensation for land dispossession, plus federalist strengthening of existing territorial autonomy in a Muslim area of Mindanao. See Jayson S. Lamchek and George B. Radics, "Dealing with the past or moving forward? Transitional justice, the Bangsamoro peace agreement and federalism in the Philippines", *International Criminal Law Review* (2021), pp. 1–28, available at https://ap5.fas.nus.edu.sg/fass/socrgb/icla_2025_lamchekradics.pdf; and "The 2012 Framework Agreement on the Bangsamoro", *Official Gazette* of the Philippines, available at www.officialgazette.gov.ph/2014/10/15/the-framework-agreement-on-the-bangsamoro/. 114 Cath Collins, "What do we mean by 'justice' for State crimes?" in *Experiences on Justice, Truth, and Memory when Facing Crimes Committed by the State,* José Antonio Guevara Bermúdez and Lucía Guadalupe Chávez Vargas, eds. (Mexico City, Mexican Commission for the Defense and Promotion of Human Rights, 2020), pp. 15–32.

usefully do so while emphasizing arguments such as that found in the 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 satisfaction component of the Principles has been interpreted, especially by the Inter-American Court of Human Rights, as entailing State duties to provide a justice-based remedy, to produce the full truth and to search for disappeared persons, for instance. If venue States do not provide these remedies, victims increasingly turn to supra-State bodies or third-State jurisdictions, including universal jurisdiction, universal jurisdiction-plus and civil actions. **For victims to resort to these methods in order to be afforded effective legal standing that their own State has failed to deliver is unsatisfactory from both a holistic transitional justice perspective and a rule of law standpoint.**

iii. The case for special treatment

If domestic justice responses are to feature, and if formal prosecution is to be a part of them, is a special unit approach – creating standalone investigative, police and prosecutorial entities, or entire special courts – essential? Sources consulted suggested not, but were emphatic that various kinds of special treatment were needed for transitional justice-related cases. Areas that were particularly highlighted were:

Active promotion of victim engagement in bringing cases

This does not refer to traditional victim support or witness protection, but to promoting an active role for victims in documenting, triggering and monitoring cases, acting directly where justice systems allow.[115]

Assuring expedited passage of transitional justice cases through the justice system

This entails attending to the necessary interfaces between special instances and other parts of the justice system, including auxiliary agencies and appeals courts, to avoid bottlenecks. This was expressed by one source as "queue-jumping the whole way through, if at all": if transitional justice cases are considered to merit expedited treatment in one part of the system, it is self-defeating to then place them at the back of a long queue for forensic corroboration or some other necessary ancillary procedure. Statistical monitoring can help, since it allows for the identification of patterns and locations of delay.

Determining what procedures and regimes to apply to defendants

This involves deciding whether to allow plea bargaining, superior orders mitigation, auxiliary penalties (including bans from public office, stripping of military honours etc.), special prison regimes or non-custodial sentences. It can also include consideration of whether rehabilitation at the level of the individual can

115 Where justice systems do not allow for such engagement, exceptions could be argued for, as has been proposed in the Gambia. The question of complex victims (or victim-perpetrators) must be addressed, however.

be pursued or allowed for, and even whether it is a meaningful concept for crimes that are inescapably collective and systemic.[116] The underlying question is whether defendants, once convicted, should be treated like any other offender, or whether there is a need for particularly vigorous or indeed particularly lenient sanction regimes.[117] Matters such as sentence supervision, the permissibility of early release and attempted pardons can provoke considerable controversy, as discussed above, and are best anticipated. Decisions may need to be backed up by legislation.

Ensuring dignified treatment of witnesses and/or victims

Victims who appear in cases will need to interact with a range of justice system personnel. They may also have to interact with defence lawyers and perpetrators in spaces mediated by clerical court staff who may not be sensitive to the need for basic adjustments such as separate waiting spaces. Common complaints from victims include those concerning invasive physical or psychological examinations, adversarial questioning and being asked to give the same testimony repeatedly. **Victim-survivors who play an active part in justice proceedings may feel empowered, but they are also vulnerable to secondary victimization, often a particular concern among survivors of sexual and gender-based violence.** Unsympathetic treatment does not always proceed from callousness, bias or bad faith; it can also result from misconstruing impartiality as precluding differential treatment. Training and awareness-raising can help, making this an area where victims associations can participate structurally and pre-emptively, preparing the ground for more sensitive justice without risking undue influence over how particular cases are conducted. Allegations in this regard, while often vexatious, should nonetheless be anticipated.

In Chile, detective police were assigned in pairs, and on a long rotation, to work as judicial investigators for long-running cases overseen by a single investigative magistrate. The resultant prolonged period of interaction with survivors and relatives, both as bringers of cases and as witnesses, broke down initial mutual suspicion. When new investigative magistrates are, occasionally, assigned, detectives often take it upon themselves to discreetly induct them into the "correct" way of doing things. This may include dissuading them from immediately resorting to two practices that are widely disliked by survivors: face-to-face confrontation between perpetrators and witnesses about points of difference in their testimonies, and the summoning of witnesses to confirm orally, yet again, the same written depositions that have been lying in the case file for years.

Facilitating points of access for bringing cases and receiving information about their progress

Many victims who are structurally vulnerable, poor and resident in rural areas are at a disadvantage in trying to interact with a single central prosecutorial or police unit. It may be

116 Although the specific likelihood of individual recidivism may be low, there may be additional imperatives of dissuasion or guarantees of non-repetition pertaining, for instance, to present-day members of the same institution. 117 Reference may be made to JEP in Colombia and to the two-year sentence cap applied in Northern Ireland following the peace agreement.

easier for victims to reach access points in the ordinary justice system if it is possible to then transfer complaints, documentation and notifications between the victims and the relevant central unit. Confidentiality and trust must be considered, however: for example, where the crimes at issue include those involving sexual and gender-based violence, which carry a high risk of stigmatization and victim-blaming, or where the proposed access point is a police station staffed by officers of an unreformed service or branch of service.[118] Trusted intermediaries[119] might instead be authorized to act as interlocutors with the central unit.[120] The existence or creation of multiple points of access can allow for reporting of breakthrough cases that may not have been on prosecutors' radar, which is itself an important precondition of providing an effective remedy through access to justice.

iv. Prosecutorial and litigation strategy

On the question of whether, and how, the functions of prosecution and investigation should be merged, a recent report strongly favours special unified entities, although the definitional criteria applied are not entirely clear.[121] **As always, function is more important than form.** Starting small, such as by allowing a capable and enthusiastic single leader to gather a small, handpicked team, can have advantages in creating unit cohesion and perhaps diminishing the room for infiltration by officers sympathetic to or reporting back to perpetrators.[122]

The disadvantages of such an approach include limited scope for expanding the capacity of the unit if initial cases "take" and additional ones come into view, a high level of vulnerability to reputational damage if the leader, or a member of the unit, are caught committing a transgression, and limited opportunities to "fireproof" a unit against closure. The potential advantages and disadvantages of using special prosecutors would also apply, with minor modification, to specialized or ordinary police, judicial police, and forensics and criminalistics personnel or units.

Potential advantages of special units

- Concentration and further development of expertise, including via specialized training.
- Continuity of human capital.
- "Critical mass" effect of creating an accountability hub.
- Enhanced traceability and more robust chain of custody of evidence.

118 For an account of the interaction of police reform supervised by the United Nations with human rights investigation in Bosnia and Herzegovina, see Claudio Cordone, "Police reform and human rights investigations: the experience of the UN mission in Bosnia and Herzegovina", *International Peacekeeping*, vol. 6, issue 4. 119 Such intermediaries may include organized relatives and survivors groups, trusted political or religious organizations, trade unions or the national ombudsperson's office. 120 In Guatemala and Peru, for example, forensic teams from non-governmental organisations (NGOs) that are engaged in the community collect testimony that individuals are wary of presenting directly to a prosecutor, and they pass it on in anonymized form. A prosecutor or other public official would have less discretion available to them, being subject to a legal obligation to formalize the testimony and to identify its source. 121 International Center for Transitional Justice, *Gearing Up the Fight Against Impunity*, www.ictj.org/node/35041. In general, metrics for success are challenging. Simple case counting or conviction counting are self-evidently unsatisfactory, while comparative conviction rates (whether across different domestic, hybrid and international justice alternatives, or between jurisdictions) are subject to too many confounding factors, including genuine differences in case complexity. 122 Highly credible sources suggest a concerted campaign of this nature was launched against staff of the now-dismantled anti-impunity units in parts of Central America.

- Consistent point of contact for related auxiliary services, national human rights institutions and relevant international agencies.

- Tighter management of confidential and sensitive data.

- Cultivation of mutual trust with witnesses and survivors.

- Easier implementation of necessary adaptations or exceptions to service protocols.

- Possibility of developing and applying a regularly updated strategic plan and specific strategies on particularly challenging or complex crimes such as sexual and gender-based violence.

Potential disadvantages of special units

- Efficacy of access: some special units have encountered non-compliance or overt challenges from other State agencies, especially when the unit is new.[123]

- "Siloing" of cases, including of evidence, which may thereby be rendered inaccessible for other transitional justice uses.[124]

- Creation of bottlenecks, due to excessive demand.[125]

- Potential for capture to lead to systemic inaction and/or risk to witnesses and informants.

- Uncertainty over demarcation, leading to systemic neglect of certain crimes.[126]

- Dilution of mandate: special units that become validated as "clean hands" units or that are technically highly effective at investigating complex cases may be assigned responsibility for other sensitive or human rights-related incidents. This risks overwhelming these units or perpetuating a tendency in the rest of the justice system to delegate responsibility and renouncing capacity-building. Any such tendency runs counter to the enhancement of system-wide guarantees of non-repetition.

- Inability to sustain desirable outcomes across the justice process.[127]

- Dependence on continued sovereign consent, where special units or teams have a hybrid or international character.[128]

123 The transfer of available human rights-sensitive personnel out of existing agencies into the special entity has sometimes exacerbated this effect. 124 In Chile, for example, an entire archive of secret surveillance files was kept sealed, and largely unused, by a specially designated investigative magistrate for over a decade. 125 Reportedly, the special prosecutor's office in Uruguay has frequently had to request postponement of case hearings due to court agenda clashes. Similar problems are endemic in Paraguay, with the counterproductive effect that delays in historical cases are caused by entities created specifically to expedite them. 126 Magistrates or prosecutors operating under the ordinary system may mistakenly refuse to admit complaints related to transitional justice-relevant violence, believing them to be the exclusive preserve of the special unit or hybrid court. Jurisdictional demarcation by perceived seriousness, international crime category and defined historical period is particularly prone to interpretive ambiguities of this sort, including where "new" crimes, such as destruction of evidence or the illegal exhumation and reburial of remains, are committed in order to cover up the old. Crimes involving sexual and gender-based violence have historically been liable to be discounted in ways that could be affected by such a tendency. Only recently, for example, have domestic courts begun to address sexual slavery and systematic rape as crimes against humanity and/or as torture, rather than as accessory offences. The 2016 Sepur Zarco verdict in Guatemala is a case in point. 127 Where well-conducted investigations and prosecutions are reversed by perverse verdicts, confidence in special units may wane. More importantly, the hopes and expectations of victims may be raised then dashed. This is of course an argument for ensuring that broader judicial reform accompanies or precedes atrocity crime prosecution, rather than an argument for reducing the efficacy or swiftness of initial stages of cases. 128 Examples include the non-renewal of mandates of multilateral anti-impunity support missions in Guatemala and Honduras (not exclusively related to transitional justice), and the withdrawal of State consent to the work of the Interdisciplinary Group of Independent Experts that investigated the Ayotzinapa disappearance case in Mexico.

To maximize the advantages of specialization while avoiding its pitfalls, some special prosecutorial entities have been created whose role is not to directly take over all investigations, but to encourage and inform a system-wide response from ordinary services. This model was used in Argentina to deal with a potentially unmanageable wave of new cases triggered by the overturning of amnesty. In post-conflict settings with particularly large caseloads, and where parallel justice repertoires are in operation,[129] a unit of this nature could act as an initial filter, distributing cases to the appropriate jurisdiction and providing or supporting capacity-building therein. It could also carry out mandatory checks as a prerequisite for allowing ordinary prosecutors or alternative justice mechanisms to resolve cases through abbreviated procedures, or by using restorative or traditional mechanisms. Such a unit would need to contain a high level of knowledge about TJ-relevant violence and the patterns characteristic of system crimes.[130]

An alternative way to secure this knowledge and make it broadly available would be to **set up a unit or office specializing in transitional justice and incorporating dedicated research capacity.** Research staff from a range of disciplines and backgrounds would be charged with combing State archives, truth commission records and other available sources of information for a range of purposes. Research capacity could be enhanced through cooperation with national and international academic and advocacy networks.[131] This suggestion draws on positive experiences of this kind.[132] National human rights institutions or ombudsperson offices could house such an entity, which might serve as a one-stop point of information for relatives and other civil society groups. It could potentially also deliver policy proposals and draft legislation across the transitional justice agenda, informed by active engagement with the United Nations and regional bodies and taking note of their reports and recommendations. Many of these functions are alien to prosecutors and other operators in the justice system, but they offer a significant potential contribution to their work.[133] This sort of interdisciplinarity has an additional advantage in bringing to the table people who are unlikely to have responsibility for past crimes, due to their relative youth or their civil society background. In Chile, for example, age cohort replacement in police and forensic departments concerned with prosecution was largely welcomed by relatives, who saw it as a guarantee that today's State professionals had not been personally involved in past repression, and were likely to have up-to-date training and scientific knowledge. Similar generational replacement in a State legal office was regarded less favourably, although this was largely because most

129 For example, twin-track formal and traditional justice, or hybrid and formal. 130 For example, JEP in Colombia incorporates an information analysis unit. 131 Relatives associations and civil society organizations are often far ahead of States in agile collaborations of this sort. A State-sponsored entity that is insulated from direct justice responsibilities combines certain freedoms (e.g. from defence disclosure requests) with enhanced access to official data sources. 132 For example, in Uruguay, a university-based team of historians worked for the executive branch for some years, preparing a report on disappearances. In Paraguay, a truth commission follow-up body proactively assumed various related transitional justice functions under the aegis of the ombudsman's office. In Chile, a unit operating as a specialized transitional justice office in all but name usefully houses a legal team, a social work team and a memorialization programme under one roof. 133 Sources suggested that, "to work, the special prosecutor needs a 'preliminary office' *[oficina previa]* that can get into how the crimes were planned … left to their own devices, [prosecutors] can't wade through all those archives and understand what they're seeing"; "You need people who are obsessively across the detail, not just the incident, but the organizational pyramid behind it"; "We need to be able to prove the patterns once, then stipulate, not have to prove them in every case".


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of the outgoing prosecuting lawyers had begun their careers in civil society human rights organizations, meaning they were linked to relatives and survivors by longstanding shared history and affective bonds.

v. Specialized training, knowledge transfer and protocols

Where knowledge transfer from international settings is necessary to enhance capacity in the domestic justice system, the introduction of external personnel, for example by seconding international judges or other staff, provides one possible channel. Where the participation of international judges is ruled out for whatever reason, enhanced amicus curiae roles have been created.[134] Prosecutorial and investigative entities, including the police, have developed similar forms of exchange or internationalization,[135] drawing on both State and non-State expertise.[136] **Such internationalization should ideally always be tailored to a specific need**. At times, tribunal hybridization has been pursued through the loaning of senior domestic judges from neighbouring jurisdictions, suggesting that the primary goal is to reinforce real or perceived court impartiality, rather than to fill a skill or knowledge gap. Credentials and experience in international criminal justice should still be a requirement, however. The identified need can sometimes be even more fundamental. For example, a source consulted for the Gambia identified a dearth of domestic judges with sufficient direct experience of presiding over complex criminal trials of any sort.

External expertise may also be secured through judicial, prosecutorial, police and forensic training in internationally validated procedures and protocols. Particular points of reference for cases involving international criminal justice and transitional justice include the international standards set out in the Minnesota Protocol on the Investigation of Potentially Unlawful Death, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) and the Berkeley Protocol on Digital Open Source Investigations. The International Protocol on the Documentation and Inves-

134 For information on JEP in Colombia, see www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/. This precedent may be useful elsewhere, such as in Liberia, where citizenship requirements enshrined in the Constitution (arts. 68 and 69) explicitly rule out foreign judicial appointments. 135 This includes the multilateral anti-impunity missions implemented in Central America in the mid-2000s, which had a strong quasi-prosecutorial component. See Due Process of Law Foundation, "Recommendations for the Biden Administration's 'Root Causes Strategy' for Central America: US priorities to promote the rule of law and combat corruption" (2021), available at www.dplf.org/en/resources/recommendations-biden-administrations-root-causes-strategy-central-america-us-priorities. 136 See, for example, Justice Rapid Response: www.justicerapidresponse.org.

tigation of Sexual Violence in Conflict is also of clear relevance.[137] Numerous equivalents, developments and specific treatments exist for most if not all of the core atrocity crimes likely to form part of a potential or actual transitional justice case universe.[138] As noted above with regard to training, some actors consulted during the preparation of this report were openly sceptical about the extent of lasting knowledge of or adherence to these protocols in specialist investigative or prosecutorial units in their home countries. This was attributed, variously, to attrition through staff turnover and to a perceived lack of relevance or practicability.[139] Some, however, reported more positive experiences with home-grown alternatives, created by blending experience and existing domestic norms with elements from the abovementioned protocols, including at the initiative of victims.[140]

vi. Caseload management and development

A report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of nonrecurrence (A/HRC/27/56) comprehensively discusses considerations for prosecutorial prioritization, including the need to avoid the twin pitfalls of one-sidedness or simple "turn-taking" in deciding who and what to prosecute, where and when. The existence of acceptable – and inadmissible – political considerations when devising a prosecution strategy for atrocity crimes has been addressed in chapter I, section A (1), and the potential practical and logistical upsides of prosecuting relatively self-contained lower-level cases to build momentum have also been discussed above (chap. II, sect. B (1) (a), "Finding a starting point"). Some former staffers at the International Criminal Tribunal for the Former Yugoslavia have suggested that such a strategy might have served them better than the more literal reading of the tribunal's "most responsible person" mandate that prevailed.[141] Others, however, see the bottom-up approach as inimical to extending prosecutorial reach to perpetrators at the pinnacle of decision-making hierarchies, military or otherwise. **Indeed, early trials of apex perpetrators may help reaffirm system and regime change, asserting the principle that no one is (any longer) above the law.**[142] Victims associations and sources close to them have signalled that a combination of high-level and direct ("foot-soldier") perpetrator accountability is often positively valued, the latter for its potential to produce fine-grained truth.[143] The reorganization of ensuing caseloads may have many

137 See www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf. **138** See, for example, the report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances (A/HRC/45/13/Add.3).**139** The terms "too unrealistic", "too complex", "too expensive" and even "too Northern" were used, despite each protocol having been drawn up or revised by a deliberately wide and international pool of experts. **140** In 2012, the Centro de Estudios Legales y Sociales (Centre for Legal and Social Studies) (CELS) of Argentina facilitated the preparation by women survivors of a protocol for judicial operators taking testimony from survivors of torture. The protocol was subsequently adopted by the relevant special prosecutor's office. See, in Spanish only, CELS, "Guía de trabajo para la toma de testimonios a víctimas sobrevivientes de tortura" (*Working guide for taking testimony from victims and survivors of torture*) (March 2012), available at www.cels.org.ar/common/documentos/GuiaESP.pdf. **141** View expressed in remarks to the 2018 Nuremberg Forum, organized by the International Nuremberg Principles Academy, attended by the author. **142** Transitions by collapse more obviously meet the preconditions in this regard, although prosecutions of heads of State always carry complications, including the risk of creating an impression of summary, hasty or improvised justice. Examples include the trial in absentia of Zine El Abidine Ben Ali in Tunisia in 2011, the conviction of Hosni Mubarak in Egypt in 2012 (which was subsequently overturned) and, most notoriously, the execution of Saddam Hussein in Iraq in 2006. The junta trial of 1985 in Argentina produced high-level convictions, but also led directly to the introduction of amnesty provisions whose effects took two decades to dismantle. **143** Two of the sources consulted affirmed that "people want justice they can see", adding that knowledge likely to be held by direct physical perpetrators about the final moments of a victim's life – including, in cases of disappearance, the exact date of their death – is often highly desired by relatives, despite the potential emotional impact. This underlines the autonomous value of judicial, forensic or police investigation for the truth dimension of transitional justice.

possible determinants, including victim participation.[144] Similarly, cases exposing the most indefensible aspects of the actions of non-State armed groups may play a role in combating the romanticization of their causes.[145] If the aim is rather to reach the maximum possible number of perpetrators or victims, a wide range of cases may be prosecuted at one time. Age, whether that of defendants, witnesses or relatives, was in practice used as a prioritizing criterion by at least some Latin American prosecutorial entities.[146]

The grouping of related cases into overarching episodes, known in South America as *mega-causas*, successfully highlights systematicity, although the practice usually slows outcomes. It can also be experienced by victims as a relativization of the importance of their personal experience of harm. **This exposes a potential tension between public and private interests in prosecution, and yet again the answer is inescapably contextual.** Where the legal system is of a type that allows survivors, relatives or other interested parties to bring criminal or civil cases, trigger investigations and/or have subsequent active standing as parties to proceedings, State prosecutors may instead tailor their efforts to "gap filling". This can entail bringing cases appearing to offer little immediate return in the form of clear declarations of culpability and enforceable sanctions, but which have a public interest justification and are likely to produce useful legal precedent or help to meet the State's international duties to prosecute certain offences.

In defining priorities, the passage of time will affect strategies. Time-related pressures may include the expiry of initial sentences, for instance. In South America, where relatively consolidated case universes have existed since the early 2000s, State offices are now being approached by relatives and others concerned about the imminent, sometimes early, release of individuals sentenced to long jail terms, including life sentences. In South Africa, similarly, the prospect of the release on parole, in late 2022, of the perpetrator of a particularly notorious apartheid-era assassination[147] provoked considerable public disquiet. This was not fully placated even when the court involved underlined the lack of available discretion in the decision, which was mandated by law. An attempt by a perpetrator to obtain a sentence reduction was halted and overturned in Argentina in mid-2017 after massive street protests.[148] **Public perceptions that the courts have afforded perpetrators unwarranted leniency carry obvious risks for guarantees of non-repetition and for affirmation of the rule of law.** Sending the message that sentence reductions, even where lawful, can be overturned if public protest is noisy or sizeable enough carries its own risks, however. It opens the way for populist punitivism in judicial decision-making and/or public scepticism about the integrity of the justice process. Sentencing policy and

144 See A/HRC/27/56. **145** JEP Case 01, concerning kidnapping for profit by the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP), may be viewed in this light, as can ongoing efforts (unsuccessful to date) to judicially link former Irish Republican Army leaders in the north of Ireland to disappearances. **146** Cases involving persons of advanced age were heard first. In addition, Chile has used a form of temporal segmentation that tracks distinct waves of repression, while Argentina has preferred a geographical logic that maps on to command structures, since each region of the country was controlled by a particular branch of the armed forces during the dictatorship. Neither country has a significant non-State perpetrator case universe to attend to, distinguishing them from many post-conflict settings. **147** The perpetrator was the white supremacist Janusz Waluś, who served almost 30 years in prison for the 1993 killing of the anti-apartheid leader and leader of the South African Communist Party, Chris Hani.**148** The case is generally known as the "2x1" ruling, after the sentence-discounting formula that the Supreme Court bench attempted – and ultimately, failed – to apply. It should be acknowledged that the legal and constitutional soundness of the decision was genuinely much more questionable than in the other country examples mentioned here.

practice ought therefore to be considered an integral part of the definition of prosecutorial strategy, clarifying from the outset who will take responsibility for monitoring, managing and communicating with the public and the prison service about the serving of sentences, and initiating any necessary modifications to existing guidelines or regulations.[149]

These matters have exposed a lack of consensus and clarity about the specific purposes of punishment for serious crimes and about the permissibility or otherwise of post-sentencing leniency. The question is accordingly raised of whether systematic differences in the postsentencing management of offenders should be expected in atrocity crime cases, as distinct from ordinary criminality.[150] Another source of unevenness in outcome proceeds from a distinction between sentencing practices in post-conflict settings and those in post-authoritarian ones. A clash between group and individual deterrence and dissuasion logics, as well as the morally and legally complex amnesty debate, can each incline the balance toward greater relative leniency in conflict and postconflict settings.[151] Thus, while it would be inconceivable, prima facie, for an international venue such as the International Criminal Court to institute a distinct sentencing regime for perpetrators according to the context in which their crimes took place (e.g. internal armed conflict or authoritarian or totalitarian rule), something akin to this seems to be discernible when domestic practice is compared between one country and another.[152] Domestic sentencing practice can also include outcomes generally considered problematic from an international rights perspective, such as imposition of the death penalty.[153] The whole matter of appropriate and permissible sanction strongly merits further international attention, including from the United Nations. Review and development of existing norms, and the filling of a present norm vacuum, are both required, as current practice and pronouncements by the regional human rights mechanisms, the ad hoc tribunals for Rwanda and the former Yugoslavia and the International Criminal Court are patchy or diverse. There is a considerable lack of clarity about what the oft-cited standard of "proportionate" sanction for grave crimes can or ought to entail.

vii. "Use the law you have"?

One recommendation by the actors consulted was to "use the law you have," imperfect though it may be. **Some felt that the instinct to turn first to international law had been counterproductive, given limited domestic receptivity to such arguments, especially initially.** A combination of utilizing the available space, including for domestically recognised crimes

149 The automatic concession of parole and of weekend and overnight release benefits was overhauled in some South American countries due to unsettling incidents of victims encountering perpetrators, whom they had assumed to be in prison, in the street. 150 Some of the South American countries mentioned above that developed a substantial domestic caseload on crimes against humanity – including Argentina, in the aftermath of the 2017 case mentioned above – have gradually introduced more exacting parole and sentence-reduction regimes for those convicted of offences that constitute crimes against humanity. 151 This tendency certainly applies to crimes that do not meet the core atrocity crime thresholds of the Rome Statute, and it potentially also applies to those that do. 152 See the introduction to chapter II above for the examples of Colombia and Northern Ireland. On differences in justice outcomes, including in domestic sentencing practice, contrasting post-authoritarian transitional justice in South America with Central American and Andean post-conflict experiences, see Elin Skaar, Jemima García-Godos and Cath Col-lins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Abingdon, United Kingdom, and New York, Routledge, 2017). 153 A former minister, Yankuba Touray, was handed a death sentence by a court in the Gambia in mid-2021. The now-deceased former dictator Hissène Habré was sentenced to death in absentia in Chad in 2008, before a series of alternative attempts at prosecution finally led to his imprisonment in Senegal in 2016 to serve a life sentence.

and charges, while "seeding" for the gradual introduction or invocation of an international *corpus iuris*, was recommended or had already been adopted in some settings.[154] The feasibility of this approach is conditioned by existing domestic norms, systems and venues. This counsel did not, though, come only from actors in relatively institutionalized post-authoritarian settings – although it was more frequently heard there.

A relatively common sequence adopted in such settings, where prosecution had often hitherto been impeded by domestic amnesty and/or statutes of limitation, was as follows:

> ***(a)*** First, test and exploit any textual or temporal exceptions to domestic amnesty, if relevant;[155]
>
> ***(b)*** Next, argue that domestic amnesty should be applied only after a full investigation, if at all;
>
> ***(c)*** Collate the information, intelligence, evidence and jurisprudence obtained from such investigations;
>
> ***(d)*** Seek out pressure points or loopholes around the outer edges of existing barriers to prosecution. Examples have included arguments about the continuous (and ongoing) nature of the crime of kidnapping, treated as a substitute for the prosecution of enforced disappearance. It was argued that, if kidnappings could be shown to have been ongoing past the point of application and coverage of a domestic amnesty law, this post-amnesty "overhang" of the crime was susceptible to prosecution;
>
> ***(e)*** Finally, argue that, where domestic crimes such as homicide or kidnapping were committed in a manner that meets the threshold test for war crimes and crimes against humanity, for example because they are committed on a systematic or widespread basis, among other conditions, they are thereby exempt from amnesty and/or statutes of limitation and must be prosecuted.

Such a sequence, with minor variations, has allowed for the belated prosecution of virtually the whole range of crimes, at least against bodily integrity, committed by military regimes in Latin America. This has been done largely using domestic law and codes, with domestic amnesty often still technically in place, and drawing on international law only in a limited way, often indirectly. However, the process was undoubtedly bolstered and catalysed by the attitudes and jurisprudence of the regional human rights system, which moved over time toward an ever more categorical rejection of the compatibility of blanket domestic amnesty with States parties' international obligations under the American Convention on Human Rights.

In sharp contrast to this domestic incrementalism, which is particularly prevalent in South America, stands the idea of importing an entire set of preconditions, which may include

154 One source described "expanding the domestic charging figures gradually, starting from inside the domestic codes. For example, we developed the court's acceptance of sexual violence as an autonomous form of torture, starting from the [admittedly deficient] criminal code figures about sexual crimes. And we still revert to those for the actual charges". Another was more succinct: "If I want to make a point, I wax lyrical about international law. If I want to win the case, I stick to the domestic code". 155 Such exceptions often existed around relatively minor crimes involving children, falsification of public instruments and, perhaps strangely, crimes against property.

international norms, personnel, and special court structures, including hybrid structures. Such an idea undoubtedly has force,[156] but the choice of any such solution should be motivated primarily by an actual or possible fit with domestic justice needs.[157] It is also important to prepare for the retroactivity and other challenges that any such creation will almost undoubtedly face.[158] Otherwise, there is a high risk that mandates will be drastically narrowed, first instance verdicts will be overturned on appeal, or the actual effect of the mechanism will be subverted in some other way, opening a gap between expectations of what international law and venues can deliver and actual outcomes.

"Third way" alternatives seem to be increasingly frequent. These utilize all the justice venues that the domestic arrangements in question already offer (including customary or traditional as well as formal), while adding concurrent resort to a hybrid alternative, situated domestically, subregionally or regionally (e.g. in the Economic Community of West African States (ECOWAS)). The political, logistical, legal and financial challenges of this simultaneity are of course numerous, particularly regarding legal certainty.

An appreciation of domestic legal culture and practice is an indispensable guide. Civil society expertise, including historical memory and case paperwork accumulated by victims groups and their advocates, is an integral part of this culture and practice. These actors should be consulted by investigators or prosecutors in ways that respect their ingenuity, courage and sense of what may be possible and what needs to change. Outside expertise can also be sought from other domestic settings which share a cognate legal system and culture or that face common post-conflict or post-authoritarian challenges. Regional systems and governance institutions, meanwhile, offer considerable potential as hubs for technical and experiential exchanges of knowledge, information, ideas and strategy. Themed special rapporteurships may be particularly apt spaces for such development, an example being the work of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

b. Investigations: obtaining and handling evidence

The investigation of TJ-relevant crimes, whether these are approached as international crimes or not, needs special approaches and methodology, while keeping in view the evidentiary threshold of the adjudicating forum. Different legal traditions can have different thresholds. They may also allocate investigative powers to a range of actors or types of actor (police, judicial investigators, prosecutors or a mixture of all three). Countries with a civil law tradition using written procedure are generally more expansive as to what can be collected and presented to the court. This potentially stretches to include testimonies and

156 See UNDP, *From Justice for the Past to Peace and Inclusion for the Future*, p. 40, on the "trend for international support to be redirected to [special courts] due to their special significance for ICL". 157 Werle and Jessberger report growing global "skepticism vis-a-vis international criminal law and the institutions called upon to implement it". See Werle and Jessberger, Principles of International Criminal Law, preface (v). 158 Direct application of international criminal law at the national level tends to create particular tensions around legality in civil law systems, since it entails an appeal to unwritten norms (custom and general principles).

other documentary or audiovisual forms of evidence that have already been provided to truth commissions or otherwise placed in the public domain. This can lessen the burden placed on witnesses or victim-survivors to repeat or revalidate their testimonies, and may even eliminate the need to face adversarial questioning in open court altogether. These advantages are often overlooked in the rush to implement reforms predicated on the notion that adversarial, oral, trial-based systems are inherently superior.

Much will depend on whether the violence at issue is long past or more recent. While "cold-case" investigative techniques are more likely to be needed in the former case, **it should not be assumed that evidence becomes scarcer, or cases less provable, as time passes.** Rather, the life cycles of perpetrators, collaborators, survivors and witnesses can lead to new revelations and confessions.[159] Documentation may come to light as time passes. This can occur by active or accidental discovery, through the introduction and exploitation of access-to-information laws, or thanks to the rolling declassification of public records.[160] **Scientific techniques can improve with time, sometimes experiencing quantum leaps partly driven by human rights imperatives.**[161] Systematic atrocity crimes, particularly more recent ones, are also likely to have attracted scrutiny through so-called citizen journalism or citizen forensics, which generates vast amounts of online and social media content, some of it unstructured, some curated into online collections and repositories. Much of this information is open source, making it available to State or non-State investigators alike. The main problem, therefore, becomes one of sifting and verification rather than scarcity. Controversies over verification and reliability can take the form of accusations and counter-accusations of systematic bias, especially when private backers, funders and third-party States become involved. More immediate potential risks to subjects from these sources also require careful consideration.[162] Enthusiasm for the soliciting, collation and processing of open-source data, or its use as evidence, must therefore be subject to careful ethical, safety and security auditing.[163]

Distance, whether in space or time, presents a set of challenges for evidence. The particular evidence deficit and the evidence strategy that is needed are contextual and are related to prosecutorial strategy. For example, in situations of weak State institutionality, where multiple armed actors have operated across non-urbanised environments, paper trails are relatively unlikely. Oral and physical forensic evidence may therefore need to occupy a prominent place. In authoritarian or totalitarian regimes, by contrast, centralized written record keeping is almost a given. More generally, wherever system crimes have been

159 The example of Adolfo Scilingo, an Argentine perpetrator who went public in the mid-1990s about his participation in the so-called death flights in the 1970s, is emblematic. 160 Werle It is potentially important for State prosecutorial or investigative units to employ researchers with a broad, ongoing remit to regularly comb such sources for novel revelations. 161 Such advances are exemplified by the history of DNA and other genetic identification techniques, as developed for use in human rights and humanitarian contexts. See Adam Rosenblatt, *Digging for the Disappeared: Forensic Science After Atrocity* (Redwood City, California, Stanford University Press, 2015). 162 In Chile, protests generated a flood of uploaded videos showing flagrant police violence, later drawn on by civil society organizations to generate a crimes-against-humanity complaint to the International Criminal Court. Police intelligence used the same material to identify and trace protesters. Further examples abound in China, in Iraq and elsewhere. 163 On security and the ethics of open data, see, in general, the Berkeley Protocol, especially chapters II (C) ("Ethical principles"); III (E) ("Right to privacy and data protection") and IV ("Security"). See also below and Jennifer Easterday, Jacqueline Geis and Alexa Koenig, "Seven essential questions for ethical war crimes documentation", 1 June 2022, available at https://responsibledata.io/2022/06/01/seven-essential-questions-for-ethical-war-crimes-documentation/.

committed, there will be a need to modify ordinary investigative approaches. At the very least, a chain-of-events approach to particular incidents should be combined with a search for patterns and the apex instigators behind them. This can be approached by investigating a group of cases or incidents to see what common features emerge. Alternatively, the main perpetrators may be pursued first, with particular incidents, charges and jurisprudence identified and used to build cases against them. While this approach may do best at uncovering planners and higher-echelon perpetrators, unless it is based on prior research (such as the work of a truth commission) it will likely result in a delay in case-by-case progress, which could be difficult to justify to the public and to victims.

i. What is it that can or needs to be proved?

The answer to this question will depend on how the investigative and prosecutorial mandate has been defined and on whether international crime concepts and theories are being directly or exclusively applied (see above). If this is the case, relatively demanding thresholds may apply.[164] The situation may be distinct where ordinary crimes or charges are also being used, although if there is a need to overcome issues around prescription or amnesty, an exceptionality argument making reference to the commission of crimes against humanity or war crimes will probably still need to be made. It is a fact of criminal law that the closer the chain of connection between a suspect and an outcome, and the more tangible the links in the chain that connects the two, the greater the probability of being able to attribute some form of criminal liability to the suspect – a fact that encourages people to resort to the defence of "I wasn't even there." It may be possible to extend modes of liability outward, for example from direct physical authorship toward co-perpetration, collusion and being an accessory – and upward, using concepts and theories such as conspiracy, joint criminal enterprise and responsibility by means of control. The fact generally remains, however, that greater distance creates greater difficulty and can entail a higher probability of acquittal.

Where different justice responses are operating simultaneously (for example, a hybrid tribunal trying international crimes, the regular courts dealing with "ordinary" serious charges and traditional, restorative or customary models being applied to crimes designated as less grave or otherwise suitable for such a format), it should be anticipated that differential acquittal rates are likely and that those of the international crimes tribunal may be higher than the rest. This can create the unfortunate optics of impunity at higher levels of responsibility.[165] It also creates a perverse incentive for perpetrators to prefer being tried, if at all, in the tribunal that deals with the most serious offences. **This may suggest that consideration should be given to prosecuting at least some perpetrators domestically, if necessary for ordinary crimes, particularly where pattern evidence may be scarce as regards the more complex charges that might, on paper, be preferable for prosecution.** This situation also lends persuasiveness to solutions such as that pursued

164 This concerns the systematicity and widespread nature of the harm and the existence of a context that can be interpreted as constituting a generalized attack against a civilian population. 165 This was evidenced in the emerging practice of referring to the United Nations Detention Unit in the Netherlands, in ironic terms, as "the Hague Hilton", implying a favourable contrast with remand and detention conditions in venue States.

by the Special Jurisdiction for Peace of Colombia (Jurisdicción Especial para la Paz, or JEP), whose lenient sanction regimes are offered on condition of recognition of guilt. Justice, as well as truth, is thus served in at least some degree, and the burden of evidence, while not lifted, is lessened.

ii. What counts as evidence? How and by whom should it be collected?

Every legal system has its own rules of evidence. Routine application of these rules may be inadequate, however, given the nature of grave harm. While it is clearly perverse to demand eyewitness corroboration for sexual violence or torture perpetrated in secret prisons, this sort of mismatch between the nature of the harm and the standard being invoked is not uncommon. Where it does not stem from simple bad faith on the part of police, prosecutors or judges, it may have its roots in the absence of certain required skill sets[166] or in the undifferentiated application of principles or practices that are routine, in that system, in the investigation of ordinary crime. **Where acts of violence of relevance to transitional justice are being investigated at least partly as ordinary crimes, it can be harder to convincingly explain why ordinary approaches are not appropriate or sufficient.**

Where ordinary approaches have flaws, the investigation of complex and system crimes can in effect be used as a "levelling-up" tool, prototype or pilot for more general review and reform of policing or prosecutorial behaviour. For instance, where there is a history of police investigations proceeding primarily on the basis of obtaining or inducing confessions, the persistence of this practice in the investigation of mass violence risks perpetuating cycles of violence. It will create new victims, including victims who are also perpetrators, and risks producing unreliable or incomplete accounts that are unlikely to travel up the chain of planning or command reliably. In settings where apex perpetrators are still powerful and may have allies and sympathisers in the police or prosecutorial services, another expression of this tendency toward deference is to investigate the victim, rather than the perpetrator. This can result in victims being subjected to repeated or intrusive questioning and to the application of ill-informed standards of veracity in order to discount their narratives.[167] Victims also often report that they have been pressured to produce ever larger amounts of corroborating evidence, including physical evidence and/or eyewitness accounts, before investigators will even accede to opening a formal investigation or registering an official complaint.

It is difficult to suggest remedies to these problems other than police reform and other efforts to change the culture of investigative and policing practice, including through training.[168] **Solutions may include the setting up of vetted and additionally trained "clean hands" investigatory units,** whether within the police, the prosecutorial service or in the forensic service

166 In Chile, some investigative magistrates who did not know how to accredit harm to survivors resorted to an entirely arbitrary standard requiring an unequivocal diagnosis of post-traumatic stress disorder. Case lawyers, survivors associations and the State forensic medical service were able, over time, to encourage operatives in the justice system to develop an improved understanding. 167 Techniques include seeking absolute consistency regarding the day, date and time of secondary details that are unlikely to be known or accurately retained following an experience of major trauma. 168 See UNDP, *From Justice for the Past to Peace and Inclusion for the Future,* p. 41, on the need for security sector reform to move beyond vetting, toward an emphasis on the role of the security services in creating and supporting a rule of law environment. In transitional justice settings, this may be easier to envisage where the State was not the primary perpetrator.

– a practice that can boost trust among victims and society in general. Close liaison with other transitional justice programmes, such as reparations-related psychosocial support, may have benefits for everyone involved, as well as for the quality of investigations. This can enhance investigators' sensitivity to victims' needs while improving community awareness of justice operators with trusted status.[169] Where mass victimization has targeted whole communities, liaison between services may allow investigators, accompaniers and victims organizations to time and phase the taking of testimony and the registering of complaints in such a way as to build individual cases into a larger case set. This may enhance the availability of support from peers and from auxiliary services throughout the investigative process, as well as limiting the risk of exposing isolated victims to intimidation, stigmatization and reprisals.[170]

iii. Are crime scene approaches useful when investigating mass or long-ago crimes?

Crime scene-focused approaches are unlikely to be helpful in situations of massive or widespread TJ-relevant violence that was committed or begun long ago. Indeed, such approaches, like some forensic methods that encourage reliance on physical evidence, can lead to an unhelpful focus on the immediate perpetrators and on high-profile urban incidents. This may come at the expense of rural massacres or otherwise neglected crimes or victims, including those who have suffered sexual and gender-based violence. Crime scene approaches can also lead to tensions between revelation and further concealment, with clandestine detention sites, archives and even mass graves being placed under embargo and declared off limits to survivors, relatives and the public because of the (often remote) possibility that directly usable physical evidence could be recovered from them, perhaps many years after the violence at issue. Uncertainty over the storage of evidence, including human remains or fragments thereof, raises similar questions.

At the same time, reconstructions of scenes, sites or geographical features can offer valuable corroborating or hypothesis-generating information. Such reconstructions range from testimony-centred re-enactments to wholly artefact- or place-based forensic scrutiny, such as examination of ballistics trajectories. One middle way lies in the use of dynamic reconstructions in real-world settings, although there are attendant dangers of secondary victimization, the transformation of violence into performative spectacle, the concession of renewed power and centrality to perpetrators, and excessive dependence on perpetrator and survivor memory. Virtual reconstructions, including increasingly sophisticated forensic ones, can eliminate some of these pitfalls while drawing on survivor protagonism.[171] These and other non-traditional techniques have come into their own in a range of quite contrasting contexts. Where there is temporal immediacy but geographical distance, including in contexts of physical inaccessibility, virtual and remote monitoring can meet the

169 Religious and other validated community leaders may have prior and stronger claims to trusted intermediary status. State teams should attempt to establish outreach links and dialogue with these established social referents. 170 See UNDP, *From Justice for the Past to Peace and Inclusion for the Future,* pp. 25–27, for examples of integrated medical, social and legal support offered to survivors of sexual and gender-based violence. 171 See, for example, Forensic Architecture's work on cases including the Ayotzinapa case, and the 3-D mapping, from survivor testimony, of the Saydnaya prison complex in the Syrian Arab Republic: https://forensic-architecture.org/.

growing imperative to map and investigate while conflict is ongoing. In contexts of geographical proximity but temporal distance, such as when decades have elapsed between commission and investigation, these methods can provide alternative means of "reading the scene". They may even redefine the notion of "crime scene" altogether, moving away from an exclusive focus on physical sites associated with immediate bodily harms and loss of life.[172] It may become possible to designate sites where planning or the issuing of orders took place as sites of commission of crimes such as conspiracy or other crimes of intent (such as genocide), or of crimes involving the ongoing concealment of information about the fate and whereabouts of disappeared persons.[173]

iv. Forensic and other tools for pursuing non-traditional sources of evidence

The returns on effort expended in this area will depend on the value that each criminal justice system places on oral testimony, documentation and scientific or other types of evidence, and on what requirements exist for validity, provenance and the chain of custody. **It may be helpful to think in terms of two overlapping tasks: research, including into systems and patterns, and the marshalling of case-usable or case-ready evidence.**

Research may benefit from the establishment, where possible, of an interdisciplinary research capacity, whether within the justice system or located in a broader transitional justice institution which will have additional uses for it. The scope of this research can encompass: (a) pre-existing non-State sources; (b) pre-existing intra-State sources; and (c) ongoing (new) information production, both State and non-State. Case-usable evidence may emerge directly, for example from the statements of witnesses, survivors and suspects, or it may be derived from or complemented by the products of research. Where it is possible to create lasting connections, major economies of scale may result. This is one aspect where the status of pronouncements by truth commissions and other State entities may prove key.[174]

Pre-existing non-State sources

These often include information amassed by victims associations or civil society organizations, including women-led organizations, human rights organizations and similar groups, both inside and outside the country. Where at least some of this information takes the form of a physical archive, compilers may well have performed not just accumulation but preliminary analysis. A respectful approach from prosecutors, asking for hypotheses and advice, rather than simply requisitioning raw data, is therefore likely to prove not only more reparatory, but more efficient.[175] The more recent the situation or conflict, the greater the probability that it will have generated a profusion of dispersed digital records and testimo-

172 Such techniques offer promise regarding violation of economic, social and cultural rights, environmental harms and corporate harms identified in the introduction and chapter I as being important, albeit extremely challenging, to investigate. 173 This stratagem has recently been used in Chile for requesting indictments and the seizure of documents in police headquarters where the policing of protests was coordinated. 174 In Uruguay, where no full truth commission has been established, the wording of reparations legislation is frequently cited in transitional justice case verdicts. The court uses it as a shorthand to stipulate the existence and basic contours of violence under the previous authoritarian regime. The actions of the legislature, in recognizing the existence of State terror during the stipulated period, are effectively treated as an administratively produced truth that can be adopted as judicial truth. 175 Positive precedents exist. In Chile, case lawyers working for the State once met regularly with specialist detective police and a relatives association to discuss how to generate basic leads in a set of cases that had proved particularly intractable. The meetings facilitated the sharing of existing information and generated insight about where to go in order to fill remaining gaps.

UN Photo/Rick Bajornas

ny. Sifting open-source information is, however, a mammoth task, often with a requirement for specialist expertise that may far exceed the resources available to domestic prosecutorial or police services.[176] The evidentiary utility of information derived from such sources is likely to be heavily contested, partly because of the relative newness of the field. It is therefore difficult to imagine that regular domestic courts will, in the short term, be conversant enough with this type of evidence to convict anyone on the basis of it. The information may fall into the category of system and pattern research, or corroborative evidence rather than evidence that is usable for primary cases, although this may change. Accordingly, calculating the importance of such evidence would have to factor in the potential opportunity costs of processing information that may prove irrelevant or non-evidentiary. The ethical, privacy and risk-related implications of storing such data should also be considered.[177]

Requests to and from other jurisdictions via mutual legal assistance are potentially productive in cases where violence had a cross-border dimension, where it has produced a diaspora and refugee displacement, or where suspects or witnesses have since fled. Such requests can, however, add layers of delay and cost.[178] Beyond State-to-State channels, international private and third sector organizations are another potential source of data. Powers of compulsion are likely to be weak, however, where cooperation is not willingly given.

Pre-existing State sources

The existence, reliability, comprehensiveness and accessibility of these sources depends on the type of transitional justice setting (post-authoritarian or post-conflict), and also on whether the perpetrators were State actors, non-State actors, or both. Where State violence was perpetrated by members of the security services, there may be a particular need to access military records to identify individual perpetrators.[179] Military stonewalling over such access can be an effective tool for impunity. The potential costs of symbolic

176 Open-source investigation has now made its way into the international secondary "market" in training related to human rights, international criminal justice and forensics. See, for example, two dedicated courses offered by a non-profit organization based in The Hague, the Institute for International Criminal Investigations (https://iici.global/). The courses are based around the Berkeley Protocol and involve some of the protocol's compilers. Free "toolkit" resources are also appearing, many of them produced by early innovators such as FreedomLab and Bellingcat. 177 This concerns situations where collated data sources fall back into the hands of perpetrating groups via State recapture, for example in Afghanistan and in some settings in the Middle East and North Africa. 178 German judges in universal jurisdiction cases related to the Syrian Arab Republic have explicitly noted the challenges presented by the need to translate and authenticate documents produced in one jurisdiction that are to be used in another. 179 In Peru, for example, the armed forces were deployed for internal "counter-subversion" operations using aliases. There are no reliable external records of troop deployments to particular conflict zones.

defeat, should the prosecution take on the military establishment and lose in an attempt to compel it to hand over records, is a legitimate consideration in crafting a prioritization strategy. Overt defiance would signal the continued fragility of the rule of law, a lack of civilian control over the military, and/or a lack of effective political support for the actions of the prosecutor.

Discoveries of police archives have at times provided key data from within perpetrating institutions, some of it used in subsequent prosecutions.[180] However, it should generally be assumed that, despite appearances, such archives may have been "cleaned" or interfered with. The investment of the human, economic and technical resources that would be needed to perform even a preliminary assessment of their utility may be prohibitive for domestic prosecutorial teams when compared to the projected evidentiary value. Here again there is utility in a joined-up transitional justice approach whereby a research unit with truth, memory and reparations responsibilities – including knowledgeable archivists on its staff – could take on responsibility. International third sector cooperation has also been used to preserve and evaluate such materials.[181] There are attendant risks, however, in that the participation of private external actors can be and sometimes has been "weaponized" to discredit or sabotage the source.[182] In general, while the physical or political vulnerability of archives and other investigative material is a valid and urgent concern, solutions that involve cross-border partnerships need careful consideration of the potential political fallout.[183] The International Council on Archives brings together a wealth of relevant experience.[184]

Ongoing production in other State and non-State spaces

Transitional justice initiatives other than prosecution initiatives may hold case-relevant information. Truth commissions are one obvious expression of this, hence the stipulations in their mandates about confidentiality, public access and judicial uses are one important factor regarding the prospects for justice.[185] Other truth-telling initiatives and archives, reparations programmes and memory museum collections, for instance, can provide further sources of information.[186] In the private and cultural spheres, investigative journalism, confessional and testimonial literature and even fictionalized accounts of past violence can be sources of relevant information.

180 There have been examples of such discoveries in the former German Democratic Republic (the Stasi archive), in Chad (the Direction de Documentation et de Sécurité (DDS) archive), in Guatemala (the Archivo Histórico de la Policía Nacional (AHPN)), and in Paraguay (the "terror archive", as it is known). **181** One example is the National Security Archive, an NGO based in the United States that promotes access to information, which has engaged in long-running collaborations with the AHPN in Guatemala and with the staff in charge of the "terror archive" in Paraguay. The United Nations and other agencies have also provided support. **182** In the case of Guatemala, subsequent political reversal has led to the closure of the archive, and to threats of criminal action against senior staff on grounds including the sharing of sensitive public information with foreign agencies. **183** Uses of archives and other material in hybrid tribunals and in transitional justice per se are explored in Jens Boel, Perrine Canavaggio and Antonio González Quintana, eds., *Archives and Human Rights* (London, Routledge, 2021), available in full at www.taylorfrancis.com/books/oa-edit/10.4324/9780429054624/archives-human-rights-jens-boel-perrine-canavaggio-antonio-gonz%C3%A1lez-quintana. **184** See, in particular, the Human Rights Section (www.ica.org/en/about-archives-and-human-rights), which produces a highly informative periodic newsletter. **185** There is an impasse, at time of writing, surrounding access to the archives of the United Nations-sponsored truth commission for El Salvador, held at United Nations Headquarters in New York. See Observatorio de Justicia Transicional, "The uses of truth: truth commission archives, justice and the search for the disappeared in El Salvador" (2018), available at www.dplf.org/sites/default/files/the_uses_of_truth_rapporteur_notes_final.pdf. **186** If there is a national archive, it can be scrutinized to assess what State entities could remit past records to it. It can also be instructive to pay attention to apparently innocuous changes to relevant regulations. In Paraguay, a law mandating a national archive (which was never created) is widely believed to have constituted a disguised attempt by the executive of the day to wrest control of the "terror archive" away from the judicial branch. In Chile, a law passed in the last days of the military dictatorship – and still in force – exempts the Ministry of Defence and the armed forces from obligations to transfer certain records to the National Archives.

Human sources of evidence

The collection of video or affidavit evidence that can be shared across cases is one way to reduce the potential secondary victimization effect of repeated testimony, particularly if the environment is adversarial. When court appearances have been inevitable, or valued or desired by victims, testimonies have been grouped together to allow mutual accompaniment, sensitive testimony has been heard in camera and victim anonymity has at times been allowed. Specially trained and designated teams have been assigned to investigate cases of sexual violence and to conduct interviews with children and young people, for example.[187] As an alternative to such approaches, the question of whether sufficient evidence of systematicity can be amassed may be revisited and, where this does seem feasible, survivor testimony could be de-emphasized or even dispensed with altogether. Instead, prosecutorial strategies can switch to focusing on conspiracy, planning and the ordering of system crimes, rather than on repeated incidences and iterations.

The testimony of expert witnesses can also be used to reduce the focus on direct victims. In Guatemala, expert witnesses were used in genocide and sexual slavery trials to introduce evidence about cultural, collective and ancestral harm and impact, beyond the personal consequences for direct victims. Systematicity and the underlying bias which speaks to intent have been evidenced in genocide cases, including through statistical analysis of patterns of known deaths, so as to dispel the "fog of war" or collateral damage arguments adduced by defendants.[188] Elsewhere, including at the International Criminal Tribunal for the Former Yugoslavia, the outcomes of mass exhumations were used to provide physical evidence that collective killings had occurred, and that identifiable ethno-religious communities had been targeted.

Testimony from perpetrators and implicated bystanders often throws up questions about the ethics and legality of offering immunity, or other benefits and concessions, for those who acknowledge their own crimes and/or inform on others.[189] Prohibitions on amnesty and other forms of impunity can, however, be read as preventing a complete suspension of sanctions. The acceptability of non-custodial and other lenient sanctions is not a settled matter. In practice, while a certain amount of discretional leeway when dealing with potential informants is required, open acknowledgement of this fact is less common, due to the particular moral and ethical charge surrounding it. Conscripts, legal minors and those who can reasonably claim to have acted under duress have at times been afforded witness status rather than treated as suspects.

187 The logistics of pre-identifying the differential need for the expertise of such teams, for investing in specialized training and for ensuring continuity (e.g. through retention of key staff) can prove challenging where this alternative is pursued in house. This particular investigatory function is less suitable than some others for the buying in or secondment of outside capacity, including international personnel, as cultural sensitivity is particularly important. Any associated need to rely on interpreters or language facilitators would, moreover, attenuate privacy and trust. **188** See, for example, the work of the Human Rights Data Analysis Group, whose director of research, Patrick Ball, has provided quantitative testimony of this kind to a range of international and domestic prosecutions of grave crimes: https://hrdag.org/. **189** In Northern Ireland, the use of so-called supergrass witnesses – former members of illegal paramilitary groups who became or become police informers – is increasingly rare, after some high-profile cases collapsed due to their evidence being declared unreliable. Witness protection and duty-of-care concerns have also been adduced.

v. Information management

Information professionals are necessary for the competent organization, management and protection of data that will be needed to address large-scale crimes adequately. While this point may seem obvious, it is common to see lawyers attempting to design and set up rudimentary databases, or prosecutors' offices and State medico-legal teams having to work with antiquated equipment or information technology systems that are not fit for their needs or the environment. Paradoxically, victims groups and other civil society human rights defenders, even in resource-poor settings, can sometimes be better equipped with tools that have been provided on a solidarity or non-profit basis.[190] Information-sharing or the transfer of information between these actors or sources, including those located outside the country, can raise both technical and ethical challenges, including those around the safeguarding of the data, its sources and the channels used, the legal ownership of original material, which is potentially subject to court seizure or requisitioning, and the ultimate responsibility (potentially a statutory responsibility) for acting on information received.

While data security is an urgent concern, and replacing outdated software or database technology can be an attractive option, this can create problems. Prosecutorial, investigatory, medical and legal personnel may be required by law to operate within existing State systems and protocols in order to secure the evidentiary usability of their outputs or preserve their compatibility with auxiliary agencies. If proprietary or specialist software and other equipment is obtained without securing long-term financing, the ongoing costs of depreciation, replacement, maintenance and licensing can become prohibitive. In general, the benefits of cutting-edge advances need to be set against the potentially counterproductive consequences of adopting unattainable or unsustainable gold standards.[191]

c. Forensic capacity, forensic evidence and the search for the disappeared

While the term "forensic" only refers, strictly speaking, to presentation in the forum of a court, it has come to be understood as the application of physical sciences, including life sciences, to criminal investigation. In the context of mass violence and atrocity crimes, its associations are at times further narrowed to the forensic search for, and examination of, human remains. This is unduly reductive: forensic genetics, including the construction and management of population reference databases and sample databases for comparison, forms an essential part of identification and tracing, while many other activities pertinent to investigation, both during and after conflict, may fall under the scope of forensic practice as broadly understood.

Depending on the nature of the violations and the time elapsed since they were committed, activities may include digital forensics, remote analysis (including satellite analysis) of the natural and built environment, data extraction from documents and archives, and evidentiary analysis of physical artefacts, ballistics and weapons. Some of these capacities and techniques may be novel, including some digital techniques, while others are particularly

190 One example is the tailor-made Martus open-source software, provided and maintained between 2003 and 2018 by the non-profit technology firm Benetech. See www.martus.org/#News. **191** Similar considerations apply in the field of forensics, specifically but not exclusively regarding the search for and identification of disappeared persons.

tailored to mass crimes, such as the statistical analysis of victim profiles to explore or demonstrate the very existence of offences such as genocide.[192] Other methods may be familiar from "ordinary" or pre-conflict criminal investigation, but with varying levels of development, acceptance and routinization. Their credibility may be low where the institutions or services that house them are suspected of perpetration, for instance where criminal investigation capacity belongs to a police service that is itself under investigation for possible perpetration.

Initial steps must therefore include an audit of capacity, taking account not only of what exists but of where it exists. How services and their practitioners are regarded by the courts that will be asked to evaluate their findings as evidence clearly matters. So, too, does their credibility among the population(s) who will be expected to interact with them and trust or abide by rulings based on their work. Services found to be particularly flawed will need reform. Whether it is feasible or necessary to resort to outside expertise to fill the gaps is a matter of context. Factors to be weighed up include the time frame of intended prosecutions, the fit between need and available resources, and the availability, reliability and legal validity of other, less technologically exacting, sources of proof. Where these other sources are primarily verbal testimony or confessions, the risks of error are correspondingly higher. The premium on physical proximity may also lead to a disproportionate focus on immediate physical perpetrators (visible "foot soldiers") as opposed to higher-order perpetrators.

Regarding general standards and goals in reforming State medico-legal systems and services

Sources including reports from United Nations special rapporteurs provide guidance on best practice standards. One recent United Nations publication entitled "Medico-legal death investigations" (A/HRC/50/34)[193] identifies the formation of intraregional and interregional professional associations, with associated conference, training and certification activity and exchange, as a major source of skills transfer and improvement in the quality and specialization of professionals over the past four decades. The document emphasizes the need for States to oversee the recruitment and integration of professionals into properly resourced and equipped public services, with arm's-length governance apparatuses that promote reliability and protect scientific credibility. The State forensic medical service of Chile was overhauled in 2006: recommendations were sought from an international expert advisory board, resources were invested and new professionals were hired. The overhaul was, in part, a response to past identification errors. In the interests of credibility, most past employees were replaced, even if they were not involved in or responsible for the errors. The decision in favour of a clean break and wholesale replacement was made in the belief that credibility was paramount and could only be obtained on a premise of renovation.

The ICRC is another abundant repository of manuals, advice and protocols, many of which are produced in numerous language versions, and with specific reference to conflict or post-conflict conditions.

192 Such a technique has been employed, notably, in relation to genocide through the use of modelling to speak to intent by demonstrating the differential incidence of violence on groups with protected characteristics. 193 This report was produced in 2022 by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Morris Tidball-Binz, himself a renowned practitioner of forensic sciences developed in and for human rights contexts.

Regarding State and non-State teams and humanitarian versus judicial modes of operation

Non-State forensic human rights entities are a phenomenon of recent decades, which can be traced back to the Argentine Forensic Anthropology Team (EAAF) that was set up in the mid-1980s. Its founders included Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions. The work of such bodies tends to be associated primarily with search, recovery, identification and restitution of the dead and disappeared. **Protection of non-State forensic personnel from physical threat emerges as a particular concern, given their unofficial status and internationally mobile nature.** The same characteristics can militate against their standing before the court. If possible, admissibility should be explored or tested before non-State teams are entrusted with large-scale or especially judicially sensitive interventions.[194]

Non-State work has often been described as taking place in a "humanitarian" mode, and it has been said to privilege relatives' needs and the restitution of remains rather than the generation of evidence for prosecution. Adam Rosenblatt questioned this distinction, which has roots in the neutrality mandate of the ICRC.[195] In practice, work done by non-State teams such as EAAF often finds its way into the court-room, at the behest of the prosecutor or on behalf of families and other parties to the case.

Regarding the demarcation of what constitutes "forensic" expertise for the purposes of the court

The types of expertise that fall under a forensic, or at least "expert witness", rubric may stretch beyond hard or natural sciences.[196] An expansive understanding of what counts as relevant expertise may assist with evidentiary challenges, for example by allowing the court to better appreciate the nature of command in military or quasi-military structures or to admit forensic accounting and asset tracing evidence that may be relevant to assess the responsibility of corporate or other economic actors.[197] Such an understanding may also allow for a greater valuation of diverse types of knowledge, alongside reliance on the validity criteria and truth regimes that drive particular "scientistic" paradigms.

UN Photo/Extraordinary Chambers in the Courts of Cambodia

194 The high-profile, decades long, stop-start El Mozote massacre case in El Salvador was almost derailed when one of the presiding magistrates, on taking the case, threatened to rule out all existing forensic analysis because it had not been carried out to court order or within the court's chain of custody control. 195 This precludes forensic and tracing work being performed in contexts of investigation for prosecution. Adam Rosenblatt, "The danger of a single story about forensic humanitarianism", *Journal of Forensic and Legal Medicine*, vol. 61 (February 2019), pp. 75–77. 196 This expertise may include the types of cultural, cultural-anthropological and historical insights that were sought by the International Criminal Tribunal for Rwanda and that were admitted by the Guatemalan court presiding over the trial of Efraín Ríos Montt in 2013 in relation to correctly interpreting the elements of genocide. 197 The Organized Crime and Corruption Reporting Project is one of various non-State open-source data initiatives that can help follow international and corporate money trails. See https://www.occrp.org/en. See also a recent successful asset confiscation case involving cooperation between the Swiss non-profit organization, the Basel Institute on Governance, and Peruvian prosecutors. The United Nations Educational, Scientific and Cultural Organization, meanwhile, is an obvious United Nations hub for tracking actions to map the growing illegal trade in looted cultural heritage, whose proceeds fuel conflict.

Regarding the use of non-State experts for field investigation

Where national medico-legal capacity is limited, absent or compromised, external forensic and field investigation teams, including international teams, may provide an alternative. Potential problems must be anticipated, however. These may include the withdrawal or withholding of permissions or access to official information or evidence, or refusal to recognise or validate unwelcome findings. Quality assurance, oversight and procedural validity parameters should be explicitly negotiated and agreed as part of any such arrangements.

Although the financial sustainability implications of dependence on external contractors must be considered, on balance there may be compelling reasons for continuing to contract out laboratory analyses and other specialist functions to regional or international expertise. Where this is done, it may be possible to optimize capacity development and knowledge transfer by resorting to well-established non-profit foundations and/or to the International Commission on Missing Persons.[198]

Regarding national forensic capacity-building

There are no real short cuts available in this demanding area, but the International Commission on Missing Persons, the ICRC, the relevant United Nations treaty bodies and special procedures, as well as the equivalent regional organizations, can provide invaluable technical assistance and guidance for both forensic interventions and capacity development. **Support for forensic capacity development should be explicitly included or offered when international funding support is provided for ring-fenced transitional justice innovations such as national search plans or mechanisms for the disappeared.** This support may entail, for instance, earmarked funds for improving existing State medico-legal capacity and the associated national skill base.

Yoking together general system improvements and high-precision special-purpose responses may add cost and bureaucratic slowness, but it can have advantages for guarantees of non-repetition and can also help to dilute resentment or hostility toward special units on the part of peers who may feel threatened or sidelined. This is one reason why a special forensic unit that began life as a "human rights unit" in Chile in 2007 was redesignated as a more broadly purposed "special identification unit" in 2012 to gain greater acceptance and collaboration from colleagues across the wider service.

Regarding high thresholds set by technological advances[199]

New and emerging technologies, including in social media, present key opportunities but also challenges for atrocity response and prevention.[200] Verification of found and open data, including image data, for instance, can be a major drain on human and financial resources. **There is also a demon-**

198 The International Commission on Missing Persons was legally established, by treaty, as an international organization in 2014. 199 Examples include the adoption of nuclear or mitochondrial DNA matching as a required "gold standard" for verifying identification and a requirement for individual identification (as opposed to categorical identification) in mass grave environments. 200 A recent (2022) briefing has described how the speed of change is driving a need for constant review of the Framework of Analysis for Atrocity Crimes developed by the United Nations in 2014.

strable tendency for lay users, which may include the courts, to overvalue or discount the conclusiveness of technological evidence or data that they do not fully understand. It is important, therefore, that collaboration with specialists is sought where possible,[201] or that evidentiary thresholds and standards of proof are set with reference to sustainability. This includes consideration of the guaranteed availability of the necessary means and infrastructure for the whole of the foreseeable duration of cases, taking account of possible challenges on appeal.

Regarding recovery and identification of human remains

The adoption of a DNA gold standard, while scientifically rigorous, implies a commitment to the purchase of potentially expensive reagents, the creation and maintenance of a sample collection, with associated confidentiality and technical safeguards, and the creation or purchase of accredited laboratory services for processing and comparison. If the necessary investment cannot be made, particularly where victim numbers are large, it may be preferable to postpone large-scale exhumation and recovery until a time when it can be guaranteed that exhumed remains will not languish in repositories or morgue facilities due to lack of capacity.[202] Alternatively, it may be decided to pursue categorical identification only where necessary and where this may be sufficient for the anticipated purposes of justice.[203] The views of relatives, survivors and communities must be taken into account, but they are unlikely to satisfactorily resolve all dilemmas that arise. Some local communities may want action to resolve perceived misfortune caused by the proximity of mass grave sites. Others may oppose any disturbance of such sites, including through a sense of collective ethnic, cultural and/or political identity that resists individuation and dispersal of people who met a common fate. In such circumstances, the performance of necessary civic, administrative, cultural and religious rituals may sometimes be sufficient to convert an irregular burial site into a long-term resting place. This desire may directly contradict the wishes of some family groups, however.[204]

The repeated discovery and restitution of fragmentary remains belonging to the same person or persons has generated other types of distress, leading, for example, to assertion of the "right not to know", whereby families declare a desire not to be further notified. Furthermore, individuation done using DNA rather than social identification requires reference samples to be provided by blood relatives. This process can bring to light anomalies in filiation and paternity that represent unwelcome and potential painful family secrets. The aftermath has at times created bureaucratic difficulties leading to remains ending up in limbo, with no one authorised to exercise decisions over a person's final resting place.

201 Amnesty International's Citizen Evidence Lab and the Digital Investigations Lab developed by Human Rights Watch are among various collaborations between human rights organizations and a cluster of third sector entities (university departments). It is questionable, however, to what extent state investigators would be allowed to rely in court on data produced or processed by civil society groups whose purpose is to independently monitor past and present State behaviour. 202 It may be particularly unwise for truth commissions to directly instigate exhumation-based interventions, given their time-limited mandates and the frequent abandonment or stalling of promised follow-up or fulfilment of recommendations. 203 It may be decided, for instance, to confirm the group identity characteristics found at a particular inhumation site without going on to excavate every individual fragment or set of remains. This practice was a source of disquiet among relatives, however, at the time of forensic interventions under the auspices of the International Criminal Tribunal for the Former Yugoslavia. 204 Spanish Civil War graves offer one example.

Taking all of these sensitivities into consideration, it is worth noting that the prosecution of enforced disappearances does not unfailingly require the recovery of remains.[205] **It is possible in many jurisdictions to prove elements of the crime without this specific form of tangible physical evidence, meaning that, in principle, justice efforts can proceed, while thorny questions surrounding search and recovery can be entrusted to a suitable dedicated entity.**

Regarding national search mechanisms or offices

There are many examples of States choosing to fulfil their transitional justice obligations regarding disappeared persons through the creation of special State search offices.[206] Major considerations include resourcing, the flow of information between such entities and the courts, their relationships with prosecutorial entities, and the ability or potential ability of these bodies to offer incentives or to guarantee immunity or anonymity in return for information. The desirability of such offices providing psychosocial support as part of their role is also emphasized.

If they are to be correctly designed, search entities should be specifically tailored to fit patterns of disappearance, the individual or institutional nature of missing intelligence about the final destination and whereabouts of disappeared persons, the type of setting (post-authoritarian or post-conflict) and the realistic likelihood that any victim may still be alive. This possibility is higher for more recent incidents, although it persists, notoriously, in Argentina, El Salvador, Indonesia and other settings where children or infants were abducted, appropriated under false identities and sometimes given away or sold in spurious "adoptions", including internationally. The legal, social and emotional challenges surrounding the restitution of identity to living survivors have included the prosecution of alleged criminality on the part of adoptive or abductor "parents". Identification has also counterposed the right to truth with the right to privacy, including in Argentina where some possible former abductees have been compelled to undergo DNA testing against their wishes.

Regarding State validation of the outcomes of search, identification and restitution

In most legal systems, identification is a legal matter rather than a technical one, meaning that a "competent authority", most often a court, must perform it. **This limits the practical legal utility of so-called citizen forensics carried out entirely autonomously from a State deemed complicit.**[207]

205 For jurisdictions that classify or interpret disappearance as kidnapping, the continued absence of the body is among the factors that make the matter an ongoing (continuous) crime. 206 See Global Initiative for Justice, Truth and Reconciliation / Due Process of Law Foundation, "An innovative response to disappearances: non-judicial search mechanisms in Latin America and Asia" (May 2022), available at www.dplf.org/en/report/disappearances-non-judicial-search-mechanisms-latin-america-asia; Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances (A/HRC/45/13/Add.3); and the Guiding Principles for the Search for Disappeared Persons (CED/C/7). 207 Such models operate in Mexico and in some parts of Spain.

3. *EMERGING THEMES WITH A PARTICULAR UNITED NATIONS INTERFACE*

a. Economic crimes in the context of transitional justice

This issue is not addressed comprehensively here for reasons of space, scope and expertise.[208] Criminal justice in general, and criminal justice in transitional contexts in particular, have to date been poor at addressing collective perpetration (for example, by corporations) and harms other than to physical integrity rights. Efforts are now being made to address corporate responsibility[209] and corruption as a human rights-framed harm. The issue of cultural heritage, meanwhile, connects the strands of collective harms and violations of economic, social and cultural rights. The looting, deliberate destruction and illegal trade of artefacts during conflict is an emerging theme,[210] for which the United Nations Educational, Scientific and Cultural Organization would be an obvious focal point for United Nations expertise.

b. Information management

The United Nations could support technical capacity and awareness within special prosecutorial offices and similar entities regarding secure data management, the production of statistics for case monitoring and the use of archives. Open-source data presents opportunities, but even greater challenges, for resource-poor settings. The United Nations could support specialized training such as that provided by the Institute for International Criminal Investigations[211] when special police or prosecutorial capacity is being set up, although sustainability, and judicial receptivity to the results, would need to be assessed.


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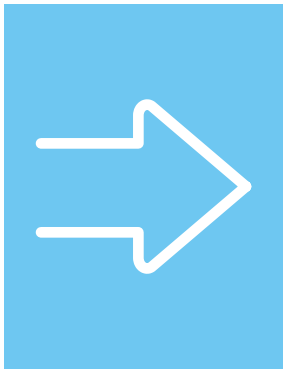
c. (Further) support for improving the responsiveness of the justice system to sexual and gender-based violence

Work has been conducted in this area by UN-Women and the United Nations Team of Experts on the Rule of Law and Sexual Violence in Conflict.

208 See, however, a comprehensive working group report (A/HRC/50/40/Add.4) that draws on transitional justice experiences to reflect on the Guiding Principles on Business and Human Rights. 209 See Global Initiative for Justice, Truth and Reconciliation, "The roles and responsibilities of private sector actors in transitional justice in Africa and Latin America" (2021), available from https://gijtr.org/resources/. 210 See Clooney Foundation for Justice, "Conflict antiquities: the docket" (June 2022), available at https://cfj.org/the-docket-projects/looted-antiquities/. 211 See https://iici.global/.

C. Additional recommendations and matters for further consultation



This chapter lists some agenda items recommended for further consideration, research or guidance. The following matters would benefit from sustained attention and input from the United Nations and its special rapporteurs:

(a) Clearer appreciation of the differences between "administrative truth", as produced by entities such as truth commissions, and judicial truth, and of the distinct truth regimes and preconditions that surround each of them;

(b) Clarification of norms, practices, definitions and purposes of proportionate sanction, the acceptability of pardons and amnesty and the uses and limits of leniency;

(c) Clarification as to whether the domestic prosecution of atrocities classifiable as international crimes can be considered both satisfactory and complete, irrespective of whether international or domestic norms and concepts are used;

(d) Clarification of the conditions and considerations surrounding rehabilitation, non-custodial sanctions and the concession of early release and other post-sentencing benefits to persons convicted of atrocity crimes;

(e) Clarification regarding at what point, and with what actions:

(i) An enforced disappearance should be considered to have ended;

(ii) States' responsibilities to search and investigate can be considered satisfactorily completed, even when a person or their remains have not been found (for instance, whether the provision of a plausible, evidence-based account of the person's final destination be considered sufficient);

(iii) A person subjected to enforced or involuntary disappearance should be deemed to be deceased for the purposes of issuing death certification to families or in civic registers;

(iv) Operators of present-day institutions widely assumed to hold relevant information may be prosecuted for withholding information as a component of the crime of enforced disappearance;

(f) The development of methodological parameters, indicators and proxies for assessing absolute and relative success in international crime prosecutions, and their relationship, if any, to strengthening the rule of law, depending on where they are conducted (international, national or hybrid venue);

(g) Development of international criminal law norms regarding specific and transversal incorporation of concerns around sexual and gender-based violence;

(h) Further reflection as to the advantages and disadvantages of State and non-State human rights-related forensic teams, and predictors or examples of success in enhancing the forensic capacity of States;

(i) Further deliberation as to the advisability or otherwise of adopting DNA identification as a gold standard for victims of atrocity crimes in resource-poor settings.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