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# Mapping the Context for National Responses to International Crimes

**Inventory and State-of-the-Art:  
Context, Cluster 3 and Cluster 4**

by Chandra L. Sriram

# MAPPING THE CONTEXT FOR NATIONAL RESPONSES TO INTERNATIONAL CRIMES

## INVENTORY AND STATE-OF-THE-ART: CONTEXT, CLUSTER 3 AND CLUSTER 4

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## 1. Context

This paper seeks to assess the current situation and the complementarity in context, rather than in purely Rome Statute terms. It examines the existing literature regarding the expected effects of specific domestic institutional and other factors, as well as of evidence and debates regarding actual effects. It builds on the mapping conducted by Stahn covering clusters 1 and 2, as well as work such as that of the International Center for Transitional Justice, both of which address legal requirements for complementarity, and legal capabilities of national systems (Stahn 2017; Seils 2016).

Complementarity, as explained by Stahn (2017), is assessed against legal benchmarks to be found in the Rome Statute, the policy papers of the Office of the Prosecutor (OTP), and decisions of the Court itself. However, complementarity is also to be understood in context. As early as 2003, an ICC informal expert paper highlighted the importance of contextual information for assessing national proceedings (International Criminal Court 2003). As Stahn (2017) observes, national proceedings have historically been the forums in which international crimes are addressed, but as this paper discusses, the quality of such proceedings is affected by the context. Beyond specific legislation and legal institutions designed to address international crimes, it is essential to be aware of the capacities of a country to address such crimes domestically. This set of capacities is addressed in cluster 3, dealing with national capacities, in which a range of domestic capacities may be assessed, based on expectations about the effects of institutional design, and evidence of such effects. The concept of complementarity in various forms, including positive and proactive, have been promoted by academics and adopted in part by the OTP of the ICC, with the expectation that strengthened domestic capacities would promote domestic trials and reduce demand for trials before an international court with limited funds and capacities (Burke-White 2008; Stahn 2017).

Similarly, a range of further contextual factors may affect the demand for and promotion of accountability domestically. These are considered in cluster 4, and may include substantive human rights protections and institutions, the presence and type of transitional justice measures, the role of civil society and other actors, and the presence or nature of ongoing conflict or repression.

I now turn to treating each cluster separately, dealing with sub-elements in turn. With respect to each sub-element, we ask two questions: 1. What do expert scholars and practitioners expect the effects of the primary independent variable will be? And 2. Is there compelling evidence supporting an expectation in the literature, or is it divided? The same structure will be adopted with respect to both national capacities and national context.

The scope and nature of the literature and evidence available varies significantly by cluster, and between the sub-elements of each. Thus, a significant number of policy documents and literature from the United Nations and nongovernmental organisations presume or assert that specific domestic institutional capacities will enable the pursuit of international crimes domestically, but there is little empirical evidence in this area. There are also wide-ranging claims, in both the academic and policy literature, regarding the effects of context, including rule of law, transitional

justice, the presence and nature of transitional justice mechanisms, the political and conflict context, and non-state actors. However, many of these claims focus on effects, not on the possibility of prosecuting international crimes domestically, but rather on future democracy and human rights records, and durability of peace agreements.

## **2. Cluster 3: National capacities to investigate, prosecute and adjudicate international crimes**

### **2.1 Institutional framework for investigation, prosecution and adjudication of international crimes**

Understandably, policymakers and academics expect that a functioning justice system capable of managing international crimes is essential to fulfil a country's obligations to investigate or prosecute under the Rome Statute; judicial independence (see below) is a critical element. So too are other elements, including investigative actors, prosecutors and/or an attorney general, administrative employees such as court clerks, and prison staff. Finally, defence attorneys and, in many cases, victims' associations are critical (United Nations 2009b; 2009d; Amnesty International 2010).

However, in many countries in which international crimes have occurred, elements of the system may have broken down or been corrupted, such that one or more of these pillars are not independent or impartial, running the risk that any attempts at prosecution will be unfair or ineffective (United Nations 2004; 2009b; 2009d; 2011). Alternatively, the absence of resources and capacity, and fear of political elites, may mean that investigations critical to any judicial process do not take place.

While there may be a domestic demand for rapid trials, this may not be possible in the immediate wake of conflict. This presents a potential challenge for assessing the inability or unwillingness of the domestic system to pursue cases under Article 17, as the Statute is not clear regarding what might constitute undue delay, and the concept of complementarity is designed to promote state responses. The appropriate timing of domestic processes thus remains one which is open to debate. The passage of time and specific evasive manoeuvres, such as diplomatic lobbying to prevent prosecutions, or vague promises of steps towards accountability may indicate inability or unwillingness, as was seen in Kenya (Obel Hansen and Sriram 2015). In other situations, delays may be the result of developing domestic procedures, as was arguably the case in Colombia.

Thus, basic principles laid down by both the United Nations and nongovernmental organisations emphasise the importance of transparency of processes, including the appointment of officials and protection of the privileges and immunities of court personnel, and the protection of the due process rights of defendants. Security for court staff and witnesses is also essential. It is clear that these formal elements would be essential to enable functional domestic processes to investigate and prosecute international crimes. However, there is to date insufficient evidence regarding the effects of such elements; that is to say whether they are necessary but not sufficient. While there may be a relatively high correlation between countries which sign up to the ICC Statute and which have the institutional capacity on paper to pursue cases (Simmons and

Danner 2010; Dancy and Sikkink 2011), a significant number may not have such capacities, and those which do may nonetheless not investigate or prosecute international crimes. The reasons for this require closer investigation, and may include the presence or absence of political will, or the presence of non-civilian mechanisms such as courts-martial processes which may fail to pursue higher-level cases. Contextual elements including political will and structures are addressed in cluster 4.

## **2.2 Specialised institutions**

Beyond the basic infrastructure underpinning criminal and ordinary justice, a country's capacity to investigate and prosecute international crimes may be strengthened through the creation of specialised bodies. These may include not only specialised legislation as discussed in clusters 1 and 2, but specialised police units, investigative and prosecutorial units, and courts or chambers, including hybrid or internationalised bodies. The independence of all actors from political interference is essential, as are due process protections for the accused (United Nations 1985; 2005; 2009b; 2009d; Amnesty International 2010). However, the simple presence of specialised institutions does not guarantee that proceedings are protected from political influence. Sufficient guaranteed staffing and financial resources are also essential to protect independence.

In some instances, specialised institutions may focus upon specific international crimes and/or enable greater access to justice in remote regions. This is the case with mobile courts in the Democratic Republic of Congo (DRC), including mobile gender courts. Such institutions can offer assistance where permanent state institutions have been inaccessible to many, or have been damaged by protracted armed conflict. Mobile courts have been used in the DRC to enable greater access to justice generally, but also to address international crimes, and the mobile gender courts in particular have been described by programmers as part of complementarity (Open Society Justice Initiative 2011).

However, having specialised courts and chambers capable of dealing with international crimes is no guarantee that they can or will manage a significant caseload, regardless of their apparent legal mandates. While the International Crimes Division in Uganda was empowered to address serious international crimes, jurisdiction over alleged war crimes committed by the national army were effectively excluded, and the division has had a few LRA cases but also targeted crimes of terrorism (Arnould 2015). Similarly, in Kenya which is, like Uganda, an ICC state party and the subject of investigations and cases, an analogous division in Kenya was announced in 2013 and its creation promised in 2015, but has yet to operate. Its focus would similarly also be on terrorism and organised crime, and serious concerns have been raised regarding investigatory and prosecutorial capacity (Obel Hansen 2015).

## **2.3 Institutional capacities**

It seems evident that institutions such as the judiciary, prosecutors and the police require adequate funding and training to enable independence. There are also significant capacity considerations for national, as well as hybrid proceedings, including in forensics, administration, investigation and victim and witness support (United Nations 2009d). These are addressed further in the next section on institutional willingness, and in sections in cluster 4 on the rule of

law and on education, but include provisions guaranteeing financial support, the mandates and capacities of institutions dealing with transnational as well as serious international crimes, and the nature and presence of training (United Nations 1985; 2004a; 2009b; 2011b; 2014).

## **2.4 Institutions' willingness to investigate, prosecute and adjudicate**

Fundamental human rights concerns underpin the need for standards and training for the police, which may help to ensure due process for the accused (United Nations 2004a). However, there is also a need to have a police force which is not only capable of but also willing to engage in independent investigations of serious crimes. This means that it must be free from political interference, and subject to the oversight of independent bodies. Further, they frequently lack the capacity to investigate complex international crimes, and to manage evidence which is necessary to prosecute not only specific incidents but patterns of practice and crimes (Groome 2011; Nielsen and Kleffner 2011).

However, historically police oversight bodies, even following significant reform, suffer significant limitations. In Sierra Leone, the Operational Support Division has not been dismantled despite the recommendation of the Truth and Reconciliation Commission which deemed it a paramilitary body; the Attorney General and Minister of Justice roles were merged, and the Vice-President sat on the police oversight body, all of which undermined separation of powers, police independence, and public confidence in the administration of justice (Commonwealth Human Rights Initiative 2002; Sriram 2014). However, the practices of the Special Court for Sierra Leone have arguably contributed to an improvement in the prison service, at least within Freetown, as well as setting a model for a victims and witnesses section. Rome Statute obligations and the demonstration effect of ICC practice could help promote improved domestic practice in policing and prisons. Institutions may also need specialised capacities to respond to crimes of sexual violence which are prevalent in armed conflict (University of California, Berkeley, Human Rights Center 2015). Similarly, domestic prosecutors may not have the capacity to manage multidisciplinary teams and the complex evidence which is collected for proving patterns of international crimes (United Nations 2009d). It is not only the prosecution which may lack adequate capacity, so too may defence, with domestic lawyers lacking the capacity to address such cases and ensure due process for defendants.

At the same time, amnesties, pardons and other barriers to investigation or prosecution may impede domestic accountability (United Nations Economic and Social Council 2005; Freeman 2009; United Nations 2009a). So too may legislation, which excludes certain categories of persons or activities from responsibility, or arguably those which limit the extent of accountability in advance. Amnesties are the most obvious barrier, and in many countries have prevented criminal accountability for at least a period of time. These include situations pre-dating the Rome Statute such as transitions in Brazil, Chile, Argentina and Sierra Leone. However, in Brazil, advocates have sought to promote criminal investigations despite the amnesty, arguing that the latter does not bar the former, as well as pursuing civil cases. In Chile and Argentina, amnesties have largely been overturned, while in Sierra Leone, by contrast, the amnesty in the Lome Peace Agreement has generally been treated as continuing in force other than the prosecutions in the hybrid tribunal (Sriram's Interviews in Brazil 2013; Chile 2014; ,

Sierra Leone 2014; Collins 2010). Finally, amnesties or *de facto* amnesties via power-sharing arrangements in peace agreements or political settlements, as well as constitutional obstacles to extradition of citizens, may limit options for domestic accountability beyond those visible in transitional and other legislation (Bell 2000; 2006; Mehler 2008; Vandeginste and Sriram 2011; Vandeginste 2016).

## **2.5 Institutional framework ensuring cooperation and assistance to the ICC**

The absence of state cooperation with the ICC, the failure of national evidence collection, or the arrest or surrender of the accused may impede cases before the court. The ICC Assembly of States Parties has developed regulations to address non-cooperation including referral of such behaviour to the Assembly or to the United Nations Security Council (International Criminal Court 2011). This guidance, however, does not set out the nature of cooperation measures which states might develop domestically.

There are a significant number of external actors which seek to support states in measures to enable domestic responses, often framed in the guise of complementarity, rule of law support, or both. These include international actors such as the various departments, funds and agencies of the United Nations, the International Committee of the Red Cross, the Open Society Justice Initiative, the International Development Law Initiative, and many more (International Criminal Court 2016). Most focus on building state capacities to manage such cases, but do not provide detailed information regarding state institutions for cooperation, although they may provide data regarding outstanding cooperation requests and responses.

There is currently a paucity of studies or data regarding such domestic state structures for cooperation; either their frequency, variety of structures, or effects. The most comprehensive volume on cooperation focuses on challenges for cooperation for the ICC rather than domestic institutions (Bekou and Birkett 2016).

## **2.6 Institutional framework ensuring the protection of witnesses**

Technical protection for victims and witnesses may be one area in which domestic processes can be most clearly brought into line with international standards, at least on paper, and diverging from both the historical absence of protections of violations even though they may have been put into legislation (International Criminal Court 2010). While children as victims and witnesses may require particular consideration and protections (United Nations 2009e), a range of protections are required for adults as well (United Nations 2009f). These include physical protection in circumstances in which witnesses and even rumoured witnesses may be targets of threats, manipulation, and killing, and those who seek to assist them may themselves be targets (Obel Hansen and Sriram 2015) as well as alternative arrangements for protection outside the country, whether in the region or internationally. To date, many countries that have experienced serious international crimes and been the subject of international or internationalised criminal courts have had limited provision for such protections at best. Guidance can be found from some sources, such as the UN Office of the High Commissioner for Human Rights (United Nations 2011c) and the Office of Drugs and Crime, though the latter's emphasis is on witness protection

in the context of organised crime (United Nations 2008). Sierra Leone has created a victims and witnesses unit modelled on the Special Court for Sierra Leone, which has yet to become operational (Sriram 2014), while Kenya has had legislation in place since 2006 and has a witness protection agency, but continues to experience serious witness intimidation (Republic of Kenya 2012). Similarly, international guidance proposes support to victims through reparations or restitution; so while in some countries legislation is in place, it has limited efficacy in many countries where serious international crimes have been committed.

## **2.7 Interaction with regional bodies or cooperation networks**

As with protection of victims and witnesses, compliance not only with due process for detainees in judicial proceedings but also with standards for the treatment of prisoners is important to ensure that domestic proceedings comply with international standards (United Nations 1977; 2004a; 2015a). The guidance is informed by international human rights standards, so requirements of non-discrimination apply, as do a series of substantive requirements. These include adequate accommodation and subsistence, medical assistance, and regulations of acceptable forms of discipline. In Sierra Leone, the handover of the Special Court prison facilities to the national prison system for the housing of female prisoners has been hailed as a success, while the conditions in domestic prisons more generally remain dire. Complying with international standards remains a significant challenge in conflict-affected countries (Penal Reform International 2016).

Regional guidance provides additional detail to that of international human rights treaties and conventions or United Nations guidance. The Organisation of American States (OAS 2008) provides significant detail regarding due process in proceedings as well as treatment and detention, including regarding health and sanitation, freedom of expression and regulation of disciplinary sanctions. While not all of this guidance may be essential for compliance with international standards for detaining those accused of international crimes, state compliance with these or other relevant regional guidance may indicate capacity to appropriately investigate and prosecute international crimes.

## **3. Cluster 4: Contextual factors**

### **3.1 Security context**

Ongoing conflict or security crises, or autonomy or impunity provided to security forces, former or current non-state armed groups, or political or other social actors who may have been responsible for serious crimes, may all constrain the possibility that a state can investigate or prosecute Rome Statute crimes. The literature on the purported tension between justice and peace, and the challenges of pursuing accountability in an ongoing conflict is extensive. However, much of it focuses on the potential for accountability mechanisms to disrupt peace agreements, their implementation, or peace building (Waddell and Clark 2008), and much less considers precisely how security situations and peace processes may shape options for accountability, tending to focus on the outcome in a binary fashion; either accountability is possible or it is not. Much of the existing data, analysis and datasets referenced here therefore tend to focus on correlations between accountability and aspects of peacemaking and peace



building or on the putative effects of the former on the latter (e.g. Thoms, Ron and Paris 2008; Melander 2009).

In many situations, the absence of security sector reform (SSR) or problematic disarmament, demobilisation and reintegration of excombatants (DDR) not only presents the risk of destabilization in fragile situations, but also obstacles to domestic accountability. Unreformed security forces, with members who have committed serious abuses or fear being accused of these, may actively oppose accountability and threaten those promoting it, and essential components of justice and security processes can also ensure that the investigations and evidence necessary for serious prosecutions are not in place. Excombatants may directly oppose accountability, refusing to disarm and threatening justice advocates and processes.

However, it may well be that certain types of security situations, actors and preferences will shape accountability in a more complex fashion. Where conflict is ongoing, several challenges may emerge. One is that the scale and in some cases the intensity of crimes may increase. With this, perpetrators or alleged perpetrators will be increasingly resistant to processes which promote accountability, domestically or internationally (Sriram 2013). Further, in many instances, accountability is hampered by the fact that non-state armed groups have not disarmed and will resist, and the state lacks control over territory or instruments of accountability. Mistrust amongst participants to the conflict may also increase, not only undermining options for peace agreements but also making agreement regarding accountability processes more difficult, as was claimed through much of the negotiations process for Northern Uganda and for Colombia.

Where countries experience a transition from conflict or authoritarianism, some of these challenges may endure. Qualitative studies of countries which have experienced extended transitions from authoritarian rule in Latin America suggest that initial resistance to accountability by security forces may abate over time for a variety of reasons, ranging from the passage of time and retirement of an old guard most affected by accountability, to reformed institutions and changes in broader public attitudes and strategies pursued by domestic actors over time (Collins 2010). Actors, whether state or non-state, may also prove resistant in some instances to accountability, and supportive of it in others even if they might be viewed as perpetrators, depending on their own interests and expectations (Sriram 2013). Further, peace agreements or political settlements with power-sharing elements can also shape or limit opportunities for accountability (Vandeginste and Sriram 2011). Further research is needed regarding how different types of political and security situations may limit options and methods for accountability, not only the legality of trials domestically in the face of amnesties or immunities, but also the capacity of political actors to block specific activities, including independent investigations and evidence collection.

### **3.2 Rule of law**

Rule of law is a complex concept which is debated theoretically and philosophically (Waldron 2002; Tamanaha 2000) as well as amongst practitioners seeking to promote rule of law in conflict affected societies where international crimes have occurred (United Nations 2004; 2011; 2011a; Hurwitz and Huang 2008; Call 2010). Scholars continue to debate the merits of

thinner, more formalistic and procedural versions of rule of law, and thicker, more substantive understandings including the scope of specific rights. Practitioners tend to merge the two, focusing on procedural elements, but including substantive international human rights norms and an emphasis on governance. Thus, the United Nations' rule of law indicators document defines it in the following:

'It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency' (United Nations 2011a, v-vi).

To support these broad goals, an independent judiciary is required, as is a police force with an independent oversight body. Investigative, prosecutorial and judicial bodies should have appropriate technical expertise and training. Finally, adequate funding to conduct work to investigate and prosecute international crimes is required.

Much of the literature on rule of law in conflict affected countries focuses on modalities to support or reform it in order to promote peace, stability and democracy; it is also often linked to transitional justice, discussed below (United Nations 2004; 2011; Sriram, Martin-Ortega and Herman 2011). This is undertaken in many contexts by not only the United Nations but through bilateral support from a range of donor countries which provide support to legislative and constitutional drafting, judicial capacity-building, and other assistance in countries which have experienced violent conflict and serious human rights abuses (UK Stabilisation Unit 2013).

Rule of law promotion is in some instances connected to the concept of positive complementarity. A critical underpinning of the concept of positive complementarity is that improved rule of law in a country can enable that country to take up cases and avoid ICC involvement; however the converse has been argued, that the ICC through proactive complementarity can advocate or enable national action (Burke-White 2008). This mirrors earlier expectations that international prosecutions by the International Criminal Tribunal for the former Yugoslavia (ICTY) might promote democracy and rule of law (Nettelfield 2010). To date, the empirical evidence that improved rule of law enables national prosecutions, at least in the short term, is thin, although the logic is clear. That is to say, functioning rule of law, including an independent judiciary and investigative and prosecutorial process, may be used to address the most serious international crimes. Anecdotal evidence may support the logic: Colombia has a relatively independent judiciary and has been able to prosecute serious international crimes, in contrast to other countries experiencing protracted conflict which have not.

Much of the discussion regarding state capacities has focused on whether the state is willing and able to genuinely prosecute accused, with the emphasis on whether it might seek to shield the accused. However, there is also reason for concern that a state might have a weakened legal system, but that those in power might pursue the accused in a trial that might not safeguard

their rights. In this context, pursuit of international crimes in a domestic context might have serious implications for the rights of the accused. This was the situation with Libya and the accused al-Senussi, where the Appeals Chamber of the ICC ultimately determined that a genuine prosecution attempt was nonetheless underway (Seils 2016, 68-69).

While further empirical research is needed, methodologies are available. Unlike in some areas of contextual research, there has been significant elaboration of indicators and methodologies to investigate rule of law generally, and rule of law in conflict affected countries specifically. These include guidance regarding definitions of the concept, data gathering as well as critical views of the claims that can be drawn from the evidence available (Cohen, Fandl, Perry-Kessarar and Taylor 2011; United Nations 2011a; Simion 2016). Governmental and nongovernmental reports utilize increasingly sophisticated indicators regarding rule of law, such as those provided by the United Nations and the World Justice Project (United Nations 2011a; World Justice Project 2016; Mo Ibrahim Institute 2016) as well as country reports issued by the US State Department or the UK Foreign and Commonwealth Office.

### **3.3 Rule of law and corruption**

Corruption is an evident cause and consequence of poor rule of law, making anti-corruption infrastructure important for rule of law generally. Indicators of a healthy anti-corruption system include not only the presence of legislation and anti-corruption bodies such as national anti-corruption commissions with adequate support, but also evidence that such bodies are functioning impartially and conducting thorough investigations that may enable genuine prosecutions of corruption itself. Other measures may include provisions for international cooperation on anti-corruption and administrative measures to ensure the implementation of legal obligations (United Nations 2003).

Corruption has not been consistently linked to serious international crimes in the scholarship on either until relatively recently, although the connections are evident (Lutz and Reiger 2009). Corruption may enable abusive regimes or non-state actors to gain or retain power, and indeed the spoils of corruption may be part of the incentive for various groups to engage in violence and international crimes. Corruption is often described more generally as part of a 'culture of impunity' which includes the absence of accountability for many crimes. Yet, it is largely the literature of transitional justice which has sought to analyse the connection and propose remedies (Carranza 2008; Robinson 2015). Meanwhile, organisations which focus on corruption such as Transparency International have begun to highlight the connection between corruption and extrajudicial killings, for example the 2016 killing of a human rights lawyer in Kenya, allegedly by the police (Transparency International 2016), and their indicators may be useful in identifying elements of corruption which may hamper accountability.

### **3.4 Rule of law and human rights**

In principle, the presence of domestic human rights protections by national human rights institutions, as well as international safeguards such as those via the United Nations Human Rights Council, might help to enable domestic prosecutions for international crimes. So too might the work of domestic and international civil society actors as well as the jurisprudence of

regional human rights bodies such as the Inter-American Court of Human Rights (IACtHR), which has adjudicated challenges to blanket domestic amnesties in countries such as Brazil where international crimes have been alleged.

National human rights institutions (NHRIs) are generally empowered to investigate and report on a range of human rights violations, which may include the commission of serious international crimes, and their work may be conveyed via Universal Periodic Review (UPR) reports to the UN Human Rights Council. While these mechanisms do not have a direct prosecutorial capacity, they may help to inform domestic investigative processes as well as international processes that might help to catalyse domestic processes. To function effectively, such mechanisms require independence, financial security, and adequate staffing (United Nations 1993; 2014). However, in many instances such institutions are starved of funding or find staffing subject to delays and other political manipulations (Sriram's Interviews in Kenya, 2010, 2012, 2014; Interviews in Sierra Leone, 2008, 2012, 2014). Guidance to assess the capacities of such institutions was endorsed by the UN Office of the High Commissioner for Human Rights and others in 2016 (United Nations 2016).

The UPR process, introduced in 2006, has reviewed the human rights records of all United Nations member states, some more frequently and thoroughly than others. Created by the UN Human Rights Council, these reports are informed by data provided by states themselves, NHRIs, and civil society actors, and in turn inform HRC analysis and resolutions regarding issues in specific countries. The reports examine respect for and violations of a range of human rights treaties, the United Nations Charter, and applicable international humanitarian law (United Nations 2016a), thus meaning that in some instances they address allegations of serious international crimes and may provide evidence of state action or inaction. Human Rights Council resolutions can encourage, but not direct, state action, including domestic investigation or prosecution of serious international crimes, as it did in a fall 2015 resolution relating to Sri Lanka. However, it has no capacity to enforce such resolutions and states may choose to ignore or interpret resolutions as they deem appropriate.

### **3.5 Transitional justice mechanisms and safeguards in place to prevent mass atrocities and impunity**

Transitional justice measures include a range of judicial and non-judicial activities, including trials, commissions of inquiry, amnesties, restorative justice processes including reparations and memorials, and vetting. While the goals of these activities are myriad, several goals are adduced by scholars and policymakers alike, including retribution, responding to the needs of victims, reconciliation, peace, democratization and rule of law (Teitel 2000; Mani 2002; United Nations 2004; 2011; Bell 2009; McAuliffe 2013; Buckley-Zistel et al. 2015). The presence and type of transitional justice measures might be expected to enable domestic accountability for international crimes may vary, and of course may include domestic trials.

Of the various mechanisms, the most relevant for enabling domestic accountability are commissions of inquiry and vetting; domestic trials may also facilitate or trigger further domestic trials or rule of law developments which enable such trials. Notably, commissions of inquiry often include names of alleged perpetrators or details regarding atrocities which may be

of use to domestic processes, although the evidentiary standards are different, which may raise concerns regarding due process (Hayner 2000). In some instances commissions specifically recommend domestic prosecutions or hybrid processes with the complementarity regime clearly in mind, as was the case in Kenya (Sriram and Brown 2012). Even amnesties, where conditional or limited, may facilitate domestic judicial processes, even if they only enable prosecution of low-level perpetrators (Freeman 2009; Vandeginste 2016).

However, the evidence regarding the effects of transitional justice on any broad human rights and democratization goals, which are the most frequently tested, remains mixed. Some scholars find greater evidence for positive correlations of the presence of one or more mechanisms on human rights and democracy, while others find negative correlations or the requirement that a mechanism such as amnesty be combined with others (Wiebelhaus-Brahm 2009; Olsen, Payne and Reiter 2010; Sikkink 2011). The contradictions among these major studies give reason for caution regarding any prescriptions for transitional justice. Some scholars dispute whether there is broader evidence regarding the overall effect of transitional justice mechanisms (Thoms, Ron and Paris 2008) and, as with rule of law, assessment remains a challenge while methodologies, both quantitative and qualitative, are becoming more refined (Dancy 2010; Duggan 2010; Arnould and Raimundo 2013). Transitional justice has also been criticised for being excessively formalistic or legalistic, although these features may be essential for any effect on the potential for prosecutions (McEvoy 2007). Systematic analysis of the effects of transitional justice mechanisms on the likelihood of domestic prosecutions has yet to be developed.

More recently, further expectations have been placed on such processes, including addressing wider economic, social and cultural rights, and development needs (Carranza 2008; Rubli 2012). While some scholars and practitioners have argued that transitional justice should address corruption, development and wider social justice concerns, others have argued that it should remain limited to its historical focus on violations of bodily integrity (Sharp 2013). However, in countries such as Peru and Egypt, crimes of corruption were prosecuted alongside more 'traditional' transitional justice prosecutions, and the *al-Mahdi* case at the ICC, alongside cases in regional courts such as the Inter-American Court, may signal the expanded response to crimes and protection of rights to be addressed in the wake of conflict (ICC 2013).

### **3.6 Education system**

Legal education and training have obvious effects on the capacity of a domestic legal system to address international crimes. Most obviously, where it has been damaged or corrupted during or prior to conflict or authoritarian rule, lawyers, judges, prosecutors, police and administrative staff may not have the technical capacity, or the willingness, to investigate or adjudicate ordinary crimes. They may be even less likely to have knowledge of, or interest in, prosecution of serious international crimes. Many states do have training institutes not only for the judiciary but also for police and other staff. However, cultures of impunity and hierarchical structures may prevail within such sectors which capacity-building by existing institutes alone may not address.

UN peace building missions and development assistance often provide support to national police and judicial training institutions and reform, as do bilateral donors such as the UK Department for International Development (DfID) (United Nations 2004a; 2011b; UK DfID 2010; OSCE 2008). While training programmes often do emphasise respect for human rights, and democratic principles, their primary focus is on the improvement of skills and assurance of mandate delivery. Thus, while there is a plausible connection between training of all such rule of law actors and improved capacity to conduct national investigations and prosecutions, any results would be seen in the medium to long term and there is currently no clear data providing significant evidence of effects.

### **3.7 Non-state actors**

A range of non-state actors may promote or hinder domestic accountability processes. Civil society actors which are focused on human rights and good governance may be active advocates of accountability, lobbying political and judicial actors and collecting data which may be used in prosecutions, often also engaging with and seeking to support ICC investigations (Rangelov 2013; Seils 2016). The effectiveness of such organisations will be shaped by the degree to which they are not only able to gather accurate data regarding violations and perpetrators, but by their capacity to engage relevant stakeholders. Civil society groups may also fill in information gaps regarding what the ICC can and cannot do in contexts where the outreach office may have limited effect, as was the case during the early engagement of the ICC with Kenya (Obel Hansen and Sriram 2015). They may indeed be empowered to promote accountability by the presence of the ICC, and, as Stahn has suggested, privatize complementarity through their activities (Stahn, email correspondence 24 November 2016). This means working with victim groups, lobbying citizens more broadly, and identifying strategies to engage governments and specific institutions of state (Seils 2016).

Such actors often face significant resistance from government and other actors, which may seek to limit their funding, intimidate them, or smear them as foreign agents, as has taken place in Kenya (Brown and Sriram 2012; Obel Hansen and Sriram 2015). Some civil society actors may oppose all accountability, or only support accountability for perceived political, military, or ethnic rivals, and of course, NGOs – often the focus of any examination of civil society capacity – are not the only actors; there are also religious groups, the media and political parties, which may all have diverse preferences and capacities in relation to any domestic accountability process for international crimes, and these may change over time as the local context shifts. There are no comprehensive comparative or large-N studies which have assessed the effects of civil society actors on accountability for international crimes domestically, perhaps because of the diversity of such actors and such changes over time.

Non-state armed groups present significant obstacles to domestic accountability in several ways. First, as participants to peace negotiations, they may object to accountability provisions being included in peace agreements and political settlements, and/or insists upon amnesty provisions (Bell 2000; Sriram 2013). This may be because leaders fear prosecution or exclusion from future political settlements themselves, or because they advocate accountability for government actors which the latter oppose. While in some instances, this may allow for accountability of lower-

level accused perpetrators, it will still limit prospects for domestic accountability for international crimes in general. Further, even where agreements have no amnesties and no specific provisions relating to accountability, they may include power-sharing provisions which enable not only state elites to retain a measure of power, but also provide for participation in governance by non state armed groups (Sriram 2008; Vandeginste and Sriram 2011). Such arrangements, which embed some state elites and some elements of non-state armed groups with control over one or more facets of power (political, territorial, economic, and military), can ensure that they have the capacity to limit future attempts at domestic accountability.

#### **4. Observations**

As this paper is a mapping exercise, there is no comprehensive argument presented here. Rather, a number of observations follow from this review of academic and policy documents relating to national capacities to investigate and prosecute international crimes domestically.

First and most obviously, it is evident that institutional capacities and the wider national context matter as much as the legal infrastructure outlined in clusters 1 and 2 of this project.

Second, the presence of relevant institutions, including specialised institutions, does not ensure that investigations and prosecutions take place. The absence of substantive capacity, human and financial resources, or the presence of bias in or manipulation of judicial, security, and other institutions need to be taken into account.

Third, the overall political, social and security context matters. Peace agreements and political settlements may shape opportunities or obstacles to accountability explicitly or implicitly. The balance of security actors and their interests in or opposition to different types of accountability also matter. Civil society actors, often associated with pro-accountability stances, are in fact diverse and changing in their aims and approaches.

Finally, while there are arguments in the policy and academic literature regarding the effects of the types of measures or contextual conditions considered here, and significant evidence can be adduced, it is difficult to find compelling proof that certain measures or conditions are consistently better. Nonetheless, in examining the challenges and opportunities in any given country, these areas are the essential places to begin.

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*The opinions expressed in this publication are solely those of the author and do not necessarily reflect the views of the International Nuremberg Principles Academy.*



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