

# The Future of Accountability Mechanisms: Twenty Recommendations

December 2021



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The ICJ is grateful for the generous support from the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

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## I. INTRODUCTION

This document records the outcomes of conferences the Kingdom of the Netherlands and the International Commission of Jurists (ICJ) held online in November 2020 and January 2021 with the objectives of:

- a. facilitating a consultation between a broad range of stakeholders on key questions concerning the role of accountability mechanisms in the global fight against impunity; and
- b. producing guidance to assist relevant stakeholders to effectively use the accountability mechanism framework to contribute towards accountability for serious human rights violations and redress for victims around the world.

On 5 and 6 November 2020, the first conference, titled "*The role of UN body-created accountability mechanisms in the global fight against impunity*" was held under the Chatham House Rule. Monique T.G. van Daalen, Ambassador/Permanent Representative of the Kingdom of the Netherlands to the UN in Geneva, and Saman Zia-Zarifi, Secretary General of the ICJ, delivered opening remarks. Participants then interacted with a panel comprised of Michelle Bachelet, UN High Commissioner for Human Rights, Fatou Bensouda, Prosecutor of the International Criminal Court (ICC), Catherine Marchi-Uhel, Head of the International, Impartial and Independent Mechanism for Syria (IIIM), and Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar (IIMM). The event was attended by over 100 participants, including State representatives, heads and staff of international accountability mechanisms, civil society and victims' groups, UN agencies, domestic legal practitioners and social media representatives.

During the conference, participants separated into four working groups based on their background and experience to develop recommendations concerning one of the following four questions:

- a. *In what circumstances should UN bodies create new accountability mechanisms, what should their mandates include (also looking at the spectrum of COIs, FFMs and independent investigative mechanisms) and how can we ensure they contribute towards accountability and redress for victims?*
- b. *How should accountability mechanisms proceed when other actors are conducting documentation and evidence collection concerning the same situation, and what is required to maximize cooperation?*
- c. *What is required for accountability mechanisms to engage effectively with victims, survivor groups, human rights defenders and civil society?*
- d. *How can accountability mechanisms support the work of national, regional and international justice processes, including the International Criminal Court?*

On 20 January 2021, the ICJ and the Kingdom of the Netherlands held a further, [public conference](#) titled "*The role of UN created accountability mechanisms in the global fight against impunity: what's next?*" which was [livestreamed](#) and attended by over 220 persons.

Stef Blok, Minister of Foreign Affairs of the Kingdom of the Netherlands, opened the event before UN Assistant Secretary General on Human Rights Ilze Brands-Kehris, on behalf of the UN High Commissioner for Human Rights, and the Prosecutor of the International Criminal Court, Fatou Bensouda, gave keynote addresses. Saman Zia Zarifi then led a discussion with panellists Radya Almutawakel, President of the Mwatana Organization for Human Rights; Cecile Aptel, Chief, Rule of Law and Democracy section, Office of the High Commissioner for Human

Rights (OHCHR); Andrew Clapham, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva; and Dr Ambia Perveen, Vice Chairperson of the European Rohingya Council.

## **II. MAJOR THEMES WHICH RECEIVED BROAD ASSENT DURING THE CONFERENCES**

The movement for international accountability is at a crucial juncture: While the international criminal justice framework has become more robust and effective since the establishment of *ad hoc* tribunals and the adoption of the Rome Statute of the ICC in the 1990s, impunity for crimes under international law remains widespread around the world. Globally, serious accountability gaps remain. The Rome Statute has yet to be ratified universally. While 123 of 193 UN Member States are party to the Rome Statute, 70 States are not, including three of the five permanent members of the UN Security Council (UNSC) and other large countries representing major population areas.

The UNSC continues to refrain from referring the direst situations of mass atrocities, including those persisting in Syria, Yemen and Myanmar, to the ICC. As time passes, evidence, which is critical to accountability processes, continues to be inaccessible, lost, destroyed, or deteriorates. And while the ICC is the only permanent body tasked to investigate and prosecute atrocity crimes, it cannot achieve the goal of ending impunity alone. In addition to domestic courts and mechanisms, which in principle are the first line of action consistent with the principle of “*complementarity*”, other international bodies have a major role to play.

In response to these realities, UN bodies, including the UN Human Rights Council (UNHRC), have created novel accountability mechanisms whose functions include the collection and preservation of evidence for use in future legal proceedings. While not able to provide full accountability themselves through prosecutions, overall, these initiatives should be seen as filling in gaps in the global accountability architecture. However, there is broad consensus that they require more resources and greater support to ensure they can function efficiently and effectively.

Several major themes emerged without contention during the conferences, including:

- a. Broad acknowledgement that, while accountability mechanisms are unable to provide full accountability, they now play a key role in filling accountability gaps around the world;
- b. Greater dialogue, coordination, and cooperation is required across the global accountability landscape, including among accountability mechanisms and victims, victim groups and human rights defenders; between accountability mechanisms and the ICC; between accountability mechanisms and national prosecution bodies; and between the mechanisms themselves; and
- c. Accountability mechanisms must be provided with the necessary time, resources, and specialized staffing required to fulfil their mandates effectively and efficiently.

## **III. METHODOLOGY**

While numerous areas of concern and suggestions emerged during the conferences, the ICJ and the Kingdom of the Netherlands have decided to limit this report to 20 core recommendations. They are organized under each of the four questions that were asked of the four working groups at the first conference.



A specific issue which arose was what should properly be called an “accountability mechanism” when a spectrum of mandates, including mixed mandates, exist from traditional human rights bodies that deliver reports on situations of concern at one end – to specialist independent investigative mechanisms at the other. The classical human rights mechanisms include UNHRC special procedures and human rights treaty bodies, - as well as Council mandates that have a specific fact-finding function, including fact-finding missions and commissions of inquiry. The organizers do not attempt to resolve this issue here and acknowledge that all these bodies to one extent or another engage questions of accountability, irrespective of whether one refers to them as an “accountability mechanism” or not. For the purposes of this report, the organizers use the term “accountability mechanism” broadly to include any UN body-created mechanism with a mandate that includes at least one accountability function, including for example fact-finding and evidence collection of serious human rights violations (whether using criminal investigatory or classic human rights methodologies), the identification of perpetrators, and/or the preparation of casefiles for use in future legal proceedings.

The terms “evidence” and “information” are often distinguished (the definition of “evidence” is sometimes limited to information gathered in a form that is admissible in court to prove certain facts). In this report, for reasons of simplicity, the organizers choose to assign the term “evidence” its broadest meaning, namely information that is gathered to support a fact whether in legal proceedings or for some other purpose such as advocacy.

#### IV. TWENTY RECOMMENDATIONS

**QUESTION 1:** In what circumstances should UN bodies create new accountability mechanisms, what should their mandates include (also looking at the spectrum of commissions of inquiry, fact-finding missions and independent investigative mechanisms) and how can we ensure they contribute towards accountability and redress for victims?

##### **1. UN bodies should continue to create accountability mechanisms to, at a minimum, assist in collecting and preserving evidence of serious human rights violations**

Where warranted, UN bodies, especially the UNHRC, should continue to create new (and bolster existing) accountability mechanisms to support and fill gaps in the international justice architecture. Victims of serious human rights violations and abuses, and violations of international criminal law (ICL) and international humanitarian law (IHL), consistently rate prosecutions as one of their highest priorities and a key element for peace, justice, truth, reparation, guarantees of non-recurrence and reconciliation. Prosecutions require the timely collection of evidence to a standard that can be used in domestic, regional, or international courts before it is lost, destroyed or deteriorates. Accountability mechanisms are increasingly performing this function until a jurisdiction for prosecution can be identified and utilized. National prosecutors and other justice actors have benefitted from evidence gathered by accountability mechanisms. States should continue to promote universal or at least wider ratification of, or accession to, the Rome Statute. They should also, singly, and through international cooperation, promote the development of the capacity of national jurisdictions to pursue universal and other extraterritorial jurisdiction cases and conduct investigations and prosecutions that meet international law and standards - noting that the ICC remains a court of “last resort”. States should also work with the UNSC to ensure that appropriate situations are referred to the ICC.

## **2. Greater dialogue, coordination, and cooperation should be encouraged and implemented between all stakeholders of accountability mechanisms**

The objectives of international justice require that greater dialogue, coordination, and cooperation occur among the many stakeholders of accountability mechanisms, including victims and their representatives, human rights defenders, State representatives (including foreign ministries, justice ministries and prosecutorial services), staff of accountability mechanisms, officers of the ICC, humanitarian organizations, UN agencies, national human rights institutions, social media representatives and domestic legal practitioners. Victims should be consulted routinely in a meaningful way to ensure that mechanisms are created and operate with a victim-centred approach. Mechanisms themselves should actively look for and take opportunities to cooperate with each other, including by sharing data (where necessary, according to relevant privacy standards), methodologies, best practices, and expertise in a way that maximizes their efficiency and donor investment. These should not only be limited to informal consultations but should be formalized and regularized in appropriate circumstances. Greater dialogue between accountability mechanisms and the ICC is also important. State representatives active in Geneva, New York, the Hague, Vienna and in capitals should also share information and experiences routinely on the topic of accountability. Ideally, States should have frameworks in place to enable the sharing of information with accountability mechanisms and to receive information.

## **3. Guidelines should be developed to help States identify, in an objective and coherent manner, when accountability mandates should be created, continued, and what their mandates should include, through fixed, predictable and principled criteria**

State decision making around the creation and continuation of accountability mechanisms - and the formulation of their mandates - should be based on principles that are grounded in established, predictable and well-considered criteria, rather than primarily on *ad hoc*, political, or transactional considerations extrinsic to the objectives of international justice. The fact that political factors are often given primacy over principled factors on the issue of accountability remains a problem before all UN bodies. For example, at the UNSC, efforts to refer appropriate situations to the ICC have been obstructed repeatedly, especially by States among the permanent five members of the UNSC holding veto power. In response to this challenge, UN bodies, including the UNHRC, have increasingly been called on to create accountability mechanisms to partially fill the resulting lacuna. However, the decision as to when accountability mechanisms should be created and what functions their mandates should include has been the subject of incoherent and inconsistent decision making, with political considerations of some States playing an outsize factor. At the UNHRC, this phenomena persists notwithstanding the joint statement delivered by Ireland (on behalf of a cross-regional group of States including Austria, Belgium, Botswana, Canada, Chile, Croatia, Czech Republic, Denmark, Iceland, Ireland, Finland, France, Ghana, Hungary, Liechtenstein, Lithuania, Mexico, Netherlands, New Zealand, Norway, Republic of Korea, Romania, Rwanda, Slovakia, Slovenia, Spain, St Kitts and Nevis, Sweden, Switzerland, Ukraine, United Kingdom and Uruguay) at the 32<sup>nd</sup> Session of the UNHRC in 2016. The joint statement sought to set out a set of guiding principles to help guide States “... *in an objective and non-selective manner, when the Council should usefully engage with a concerned State, to prevent, respond to or address violations and to assist in de-escalation of a situation of concern.*” The mandates of new accountability mechanisms should retain sufficient flexibility to allow them to work effectively within the existing international justice architecture. Mandates should also emphasize explicitly the requirement of cooperation with the ICC.

**4. Appropriate time, resources and staffing should be allocated to accountability mechanisms to ensure they may fulfil their mandates efficiently and effectively**

To fulfil mandates efficiently and effectively, accountability mechanisms require the appropriate time to execute their mandates, adequate resources, and staffing (both quantitatively and in terms of the nature and depth of expertise). Usually, the mandates of country-specific *ad hoc* accountability mechanisms are initially only of one year duration and not subject to automatic renewal – renewal is often required periodically at the relevant UN body, which can become overly politicized. Moreover, at inception, accountability mechanisms often encounter complex administrative challenges within the UN system – including delays with the allocation of resources and appropriate staff – which eat into the time allotted for the substantive fulfilment of the mandate. Accordingly, States should consider longer initial mandates to ensure adequate time is allocated at the start of a mandate to obtain required resources and staff while leaving sufficient time to fulfil the substantive terms of the mandate. Likewise, sufficient time should be allocated towards the end of a mandate, including following submission of the mandate report, to enable proper archiving of evidence for use in the future, including in legal proceedings. Accountability mechanisms mandated with special functions such as collecting and preserving evidence of crimes under international law for future legal proceedings are likely to require specialized staffing and resources, including for example, the ability to receive and process large volumes of evidence, or use satellite technology or open-source material available on the Internet. They may also require staff with expertise in international criminal law and sexual and gender-based violence (SGBV), where appropriate. However, the allocation of resources should not be at the expense of support for other human rights mechanisms, including treaty bodies and special procedures. During the conferences, the added value of OHCHR's Investigation Support Unit in providing support – including of a technical and administrative nature – to certain accountability mechanisms was emphasized. The work of the Unit may also contribute to the consistency and efficiency of different mandates.

**5. States should support the development of and, where appropriate, the adoption of, innovative means of advancing the accountability mechanism framework to ensure it progresses in a logical and principled basis that best serves justice and the interests of victims**

States should support the development of and, where appropriate, the adoption of, innovative means of advancing the accountability mechanism framework in a way that best serves justice and the interests of victims. To date, the development of the framework has been largely *ad hoc*. In most cases mechanisms were created in the context of unique political circumstances. This approach has brought with it inefficiencies. Each time a new mechanism is created on an *ad hoc* basis, an enormous amount of diplomatic, organizational and financial resources is required. During the start-up phase, mechanisms go through a protracted period of recruitment of specialized personnel before they can begin their core work. Within the UN system recruitment is time consuming. This has been aggravated by the UN's regular budget liquidity crisis and recruitment freeze. For example, the Independent Fact-Finding Mission on Libya was over halfway through its 12-month mandate before its secretariat was in place. Once operational, mechanisms must procure specialized databases to help receive, analyse and authenticate the large amounts of often duplicative evidence received. For example, in the five months following the 2021 military coup in Myanmar, the IIMM reported receiving over 210,000 communications. Options to address these challenges include the [creation of a Standing Independent Investigative Mechanism \(SIIM\)](#), which is likely to have a number of substantive, political, and administrative benefits over the current approach. One benefit would be to avoid the criticism of the prioritization of political factors in the creation of new mechanisms. Another



is the rationalization of resources since there would be savings if entire administrative operations did not have to be established with each new mechanism. A further option – which could take place concurrently – is to dramatically bolster and adjust the operational terms of OHCHR to address accountability related issues, including the ability to respond rapidly to emerging crises.

**QUESTION 2:** How should accountability mechanisms proceed when other actors are conducting documentation and evidence collection concerning the same situation, and what is required to maximize cooperation?

**6. Accountability mechanisms and others investigating and documenting the same situation should seek to actively coordinate and, where appropriate, minimize conflicts in their mandates and engage in active cooperation**

Accountability mechanisms, including the ICC and other organizations and agencies documenting and investigating the same situation, should seek to coordinate and, where appropriate, minimize conflicts in their mandates. Recognizing the need for independence, there may be situations where active cooperation, including exchanges of evidence, would be appropriate, though this would require suitable protocols to be established. As UN body-created mechanisms assume greater focus on accountability, the likelihood their mandates may overlap with bodies that have criminal investigative functions, including the ICC, increases. At the same time, human rights defenders and other organizations may also be conducting human rights research and documentation of the same situations and covering some of the same violations. Typically, such human rights research and reporting precedes and motivates the establishment of any accountability mechanism. In respect of certain human rights research and monitoring, the primary objective may not be to obtain “evidence” in its juridical sense, but rather to report on, expose and publicize violations. This has the practical consequence of several actors, each with independent mandates, seeking to obtain and preserve the same evidence, including documents and witness testimony. While these simultaneous efforts should have a force multiplier effect on contributing towards accountability, there is a risk that, without appropriate coordination and de-confliction, they could become siloed, competitive and, at worse, harmful to victims and witnesses (including potential re-traumatization through multiple interviews), and future accountability processes including criminal trials. De-confliction means that parties with legitimate but distinctive mandates should take all reasonable steps to fulfil their mandates in a manner that does not conflict with the legitimate mandates of others active on the same situation. Efforts at coordination and de-confliction should occur following efforts to proactively map and reach out to others already working on the same situation. Dialogue should also cover logistical and operational issues. Accountability mechanisms should establish a focal point to encourage ease of ongoing engagement with other actors conducting investigations and documentation of the same situation.

**7. Accountability mechanisms and others investigating and documenting serious human rights violations should proactively seek dialogue with humanitarian agencies, NGOs and others who do not have an accountability mandate and, where appropriate, minimize conflicts in their mandates**

Accountability mechanisms and others investigating and documenting serious human rights violations should proactively seek dialogue and coordination with organizations and agencies active on the same situation which primarily have humanitarian mandates. These include UN agencies such as the United Nations High Commissioner for Refugees (UNHCR), humanitarian

organizations, including the International Committee of the Red Cross (ICRC), and non-governmental organizations (NGOs) such as *Médecins Sans Frontières*. While these agencies and organizations may have access to information of interest to those investigating and documenting situations for accountability purposes, their mandates are not directed towards accountability outcomes. However, UN agencies and humanitarian organizations which are providing humanitarian assistance should be sensitive to possible accountability issues in situations where crimes under international law are credibly alleged and being investigated. Dialogue should include the extent to which coordination and the sharing of evidence is possible - considering all relevant privacy and neutrality concerns - and whether appropriate efforts should be made for parties to de-conflict their mandates. De-confliction means that parties with legitimate but distinctive mandates should take all reasonable steps to fulfil their mandates in a manner that does not conflict with the legitimate mandates of others active on the same situation. Accountability mechanisms should establish a focal point to encourage ease of ongoing engagement with humanitarian actors.

**8. Accountability mechanisms should hold frequent formal and informal dialogues with NGOs conducting documentation for accountability purposes to discuss best practices for evidence collection**

Accountability mechanisms should coordinate with NGOs who are collecting evidence for use in accountability processes to identify best practices, particularly on complex or sensitive issues like conflict-related sexual violence (CRSV) and crimes against children. In situations where serious human rights violations have been committed, some NGOs will collect evidence for a variety of purposes. These may include to report on and publicize violations to provoke, through advocacy, a national, regional, or international response – as well as to preserve evidence for use in future accountability proceedings. Accountability mechanisms and others engaged in criminal investigations, including the ICC, increasingly acknowledge the importance of relying on the support of NGOs for several reasons, including as providers of evidence. However, the way evidence is collected - and to what standard - may have an impact on its usefulness and reliability in accountability processes. To minimize the possibility of NGOs gathering evidence and providing it to accountability mechanisms in a way that compromises its usefulness, accountability mechanisms should be prepared to provide its partners with the required guidance and training on evidence collection. Accountability mechanisms should also be prepared to recommend tools for those conducting documentation, including what practices would best compliment the accountability mechanism's own procedures. Conversely, accountability mechanisms might be guided on how their own efforts can help to establish facts and support truth-seeking beyond criminal trials, including, for example, to consider ways of sharing evidence to the extent that it would not compromise investigations or eventual trials.

**9. Accountability mechanisms and other bodies active investigating the same situation should consider conducting joint outreach activities**

Different actors investigating the same situation should consider conducting joint outreach activities. Increasingly, accountability mechanisms are investigating situations where others with overlapping investigative mandates may also be active, including the ICC. While this should have a force multiplier effect, it also risks confusing stakeholders, leading to frustration and disillusionment with accountability processes that they may see as duplicative, remote, and unnecessarily complex. It may also inhibit the ability of stakeholders to inform their expectations and plan engagement with accountability mechanisms. Joint outreach would assist stakeholders, including victims and human rights defenders, differentiate between the roles and functions of different bodies. It would also help in building relationships and trust with affected communities rather than relying on third parties such as international NGOs to explain

the distinctions between various actors and their mandates. Where possible, all bodies investigating the same violations should agree on the same key terminology, including the way key words and concepts are translated and transliterated.

**10. Donors should coordinate between themselves before determining which activities to support and, once supported, encourage coordination between NGOs conducting documentation**

Before deciding which accountability-related activities to support, donors should – to the extent it is possible and without introducing unwarranted delays – coordinate between themselves so that, collectively, a more coherent and complimentary set of activities are supported overall. Once support has been provided, donors should also encourage coordination between NGOs conducting documentation. In the past, there have been instances where donors have funded similar, overlapping, documentation efforts. This has increased the risk of harm to victims and witnesses due to duplicative and unnecessary interviews. There have also been examples of donors supporting the development of new technology prototypes, which were duplicative of existing technologies. This could have been avoided through better coordination between donors and NGOs engaged in similar initiatives.

**QUESTION 3:** What is required for accountability mechanisms to engage effectively with victims, survivor groups, human rights defenders, and civil society?

**11. Accountability mechanisms should actively seek out an appropriately representative range of victims, survivor groups and human rights defenders, and formulate tailored strategies for engaging with them**

Accountability mechanisms should actively seek out an appropriately representative range of victims, survivor groups and human rights defenders, and formulate tailored strategies for engaging with them, recognizing they all may have distinctive interests, objectives, and capacities. Some may wish to provide evidence to accountability mechanisms for accountability and truth-seeking purposes. Others may only wish to be kept informed and to monitor the accountability mechanism's progress. Only certain stakeholders may have the desire and ability to form a long-term relationship with the accountability mechanism. Accountability mechanisms should further ensure they are not entrenching discrimination and negative structures of power within communities through their engagement, based on gender or ethnicity for example.

**12. Accountability mechanisms should hold regular and scheduled outreach meetings with stakeholders including victim groups and human rights defenders**

Accountability mechanisms should hold regular outreach meetings with stakeholders. Often victims and human rights defenders are the driving force behind the creation and effective operation of accountability mechanisms. In many circumstances, they possess unparalleled knowledge, experience, and expertise – a rich resource that should be acknowledged and utilized with informed consent and where appropriate. Initial and ongoing outreach with victims and other stakeholders is critical to the success of an accountability mechanism. Victims and human rights defenders should be treated as equal partners in seeking justice and not only one-way providers of evidence. Often the demand for information is at its greatest at the start of a mechanism's mandate, so budgets should account for the need for outreach officers from the beginning. Budgets should include sufficient support for related costs including travel and

the face-to-face interviews of victims and survivors, production of materials, and necessary interpretation and translation costs. Once a mechanism is established, victims and human rights defenders will have many questions including: *what will their role be? What will the terms of engagement be? How will issues such as confidentiality and consent be dealt with? How will evidence be stored and used? With whom will evidence be shared? How will their security be ensured?* Setting expectations at the start of a mechanism's mandate is important. Different means of communication should be explored. For some groups, face-to-face communication may be most effective. For others radio, social media or encrypted messaging applications may be more appropriate. As relationships mature, outreach should become more focussed. Where an objective is identified – such as obtaining evidence of SGBV – the accountability mechanism and stakeholders should discuss how to work together towards achieving that objective, which should be viewed as shared. Where possible, focal points of the different components of the mechanism should be appointed and attend meetings. Ongoing outreach is necessary because as time passes, victims and human rights defenders who wish to assist and cooperate with an accountability mechanism's investigation often find it difficult to establish what the mechanism is looking for and how they may be of assistance. Regular, scheduled, meetings between accountability mechanisms and stakeholders should be considered, such as the "[Lausanne process](#)", a semi-annual meeting between the IIIM and NGOs, supported by donors. Merely providing contact details such as an email address to send evidence is generally inadequate and inefficient. Where appropriate, accountability mechanisms should make available to relevant stakeholders who are providing material assistance to an investigation an "operational plan" which contains details of an investigation's priorities, direction, and progress - to the extent possible - without compromising the integrity of the investigation and/or the safety and security of victims, survivors and witnesses.

### **13.Accountability mechanisms should consider drafting a "protocol of collaboration" with key stakeholders including victims and human rights defenders**

Accountability mechanisms should consider consulting with key stakeholders including victims and human rights defenders with the aim of formulating a general protocol for NGO cooperation and engagement if parties agree. Civil society formulated such a protocol for its engagement with the IIIM. The protocol helps ensure that ongoing collaboration is meaningful and in furtherance of everyone's common interests in seeking accountability and redress for victims. It will also provide victims with a sense of ownership over the process. A general protocol may include overarching principles that will guide the relationship between the mechanism and key stakeholders, including how evidence will be used and with whom it will be shared and under what conditions. The protocol should set out the various opportunities for collaboration and, where required, the operational details and working procedures of relationships, including potential means by which to facilitate victim and witness protection where needed. Where appropriate, accountability mechanisms should also consider entering into individual and more tailored MOUs with different NGOs, recognizing that stakeholders may have different interests, objectives, and capacities. Again, the IIIM entered into tailored MOUs with a number of different NGOs that enabled them to set the terms of their engagement with the IIIM, including how their evidence will be used and shared with third parties. A process of providing periodic feedback and updates to those who have provided evidence would also be best practice, including how the investigation is developing and its strategy and direction.

**14. Accountability mechanisms should develop clear and accessible policies that deal with issues of consent and confidentiality**

Accountability mechanisms should develop clear and accessible policies on how they will deal with issues of consent and confidentiality. Victims and human rights defenders have different levels of awareness around accountability and international justice processes. Consequently, they are sometimes unclear about the role of accountability mechanisms and their mandates and are unsure whether they should trust and share evidence with them. Particularly as accountability mechanisms are often conduits of evidence to later be provided for use in future accountability proceedings that may not have been identified at the time evidence is obtained. Accountability mechanisms should put in place clear policies and procedures for dealing with confidentiality and consent which can be shared with victims and human rights defenders before they decide whether to cooperate and share evidence. Discussions about whether victims or witnesses wish to provide informed consent for their evidence to be shared with third parties should be an ongoing conversation and not just a “once-off, box-checking” exercise. This is especially important if a significant period of time passes from when consent was provided to when the evidence may be shared. Particularly if the third party/process to whom the evidence may be shared was not anticipated at the time consent was provided. In these circumstances, even if some form of “blanket” consent was provided the issues should be raised again directly with the person who shared the evidence. This necessitates the keeping of accurate and regularly updated contact information of persons and organizations who share evidence with the accountability mechanism.

**15. Accountability mechanisms should have clear and accessible protocols for ensuring the safety and security of victims, witnesses and others who assist the mechanism**

Accountability mechanisms should have clear and accessible protocols for ensuring the safety and security of victims, witnesses – including their communities - and others who assist the mechanism, such as interpreters and translators. Persons cooperating with international justice processes, including the work of accountability mechanisms, face the risk of retaliation from governments or other hostile groups. Where appropriate, this should include the establishment of a witness protection unit. They should develop procedures in accordance with international law and standards to ensure that witnesses and victims may contribute to the work of the mechanism without fear of retaliation. Accountability mechanisms should put in place procedures for determining whether it is appropriate even to allow for consent in situations where the personal security of a victim, survivor or their family may be at risk and where adequate protection measures cannot be secured. Special protocols should be adapted for when victims and witnesses are children and their capacity for informed consent is the primary consideration, considering the best interests of the child.



**QUESTION 4:** How can accountability mechanisms support the work of national, regional and international justice processes, including the International Criminal Court?

**16. Principled guidelines should be developed to assist accountability mechanisms adopt processes and protocols for the preservation of evidence in a way that anticipates and best supports future uses, including accountability processes, while protecting the interests, safety and security of evidence providers**

Principled guidelines should be developed to assist accountability mechanisms adopt processes and protocols for the preservation of evidence in a way that anticipates and best supports future uses including accountability processes, while protecting the interests, safety and security of evidence providers. Presently a set of uniform guidelines does not exist and accountability mechanisms either do not have protocols in place or adopt their own. The lack of a clear system can result in repositories of evidence sitting with the responsible UN agency for years after an accountability mechanism's mandate ends, without clear criteria on how the evidence may be used or shared and under what conditions. Such guidelines may include issues on how to keep track of guarantees that were provided to evidence providers, any restrictions that were attached to the provision of the evidence, and the contact details of sources and witnesses – in case they need to be contacted again – including notes on consent and security concerns.

**17. Principled guidelines should be developed to assist accountability mechanisms decide when and with whom to share evidence and for what purposes, including for possible use in non-criminal proceedings**

A set of principled guidelines should be developed to assist accountability mechanisms decide when and with whom to share evidence and for what purposes, including for possible use in non-criminal proceedings. Currently, accountability mechanisms do not follow a uniform approach and a central set of guidelines does not exist. For example, should accountability mechanisms share evidence not only with State authorities, but also with victims and their lawyers, human rights defenders and/or defence counsel, if requested? Should evidence be shared for use in non-criminal proceedings, including for example civil proceedings seeking reparations or refugee or immigration proceedings? Should a substantive or procedural link to the serious human rights violations and crimes under international law being investigated be required? Should accountability mechanisms also consider sharing evidence to assist with the consideration and implementation of any sanctions, asset freezing or confiscation orders? A clear and streamlined approach across accountability mechanisms would add predictability and consistency when accountability mechanisms are confronted with these questions.

**18. When determining whether to share evidence with State authorities, accountability mechanisms should look beyond their fair trial rights record as a key condition and consider the rule of law situation more generally**

When determining whether to share evidence with states, accountability mechanisms should look beyond their fair trial rights record as a key condition and consider the rule of law situation more generally. While a State may comply with fair trial obligations, other factors of concern may exist including relevant domestic laws which are inconsistent with international human rights laws and standards and/or patterns of violations, including suppression of fundamental freedoms or persecution of, and retaliation against, human rights defenders. Accountability

mechanisms may also consider matters such as victims' rights to participation, victims and witness protection and the appropriate treatment of sensitive victims including children and victims of SGBV.

**19. Once an accountability mechanism has shared evidence with a third party pursuant to certain conditions, it should, to the extent possible, monitor compliance with those conditions**

Once an accountability mechanism has shared evidence with a third party pursuant to certain conditions, it should, to the extent possible, monitor compliance with those conditions. Accountability mechanisms share evidence with third parties, most commonly States, subject to certain conditions. These usually include guarantees of confidentiality, protection, and adherence to fair trial rights obligations. However, once the evidence has been shared, it is possible these guarantees are not met, potentially creating harm for accused persons, victims, and witnesses. Once an accountability mechanism's mandate had ended, that function should be continued by OHCHR or the relevant UN agency's secretary on an ongoing basis. Accountability mechanisms should have protocols in place to react to a situation where conditions are not adhered to by the third party.

**20. Accountability mechanisms should look for ways to support national prosecutors on an ongoing basis beyond merely sharing evidence**

Accountability mechanisms should look for ways to support national prosecutors on an ongoing basis beyond merely sharing evidence through a *note verbale* in cases involving grave international crimes through universal jurisdiction. The prosecution of crimes under international law is inherently complex, often requiring specialized expertise that national prosecutors may not possess. Consequently, accountability mechanisms should – capacity permitting – continue to support national prosecutions after evidence has been shared, including for example by providing technical assistance, case file review, advice on the theory of the case and charging, and assistance with specialized areas of the prosecution such as the contextual elements of crimes or crimes of SGBV.

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Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

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Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

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Justice Kalthoum Kennou, Tunisia

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Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

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Justice Charles Mkandawire, Malawi

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Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

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