

RESEARCH INSTRUMENT

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FOREWORD



by Diane F. Orentlicher

In the introduction to his seminal study of “impunity of perpetrators of human rights violations,” United Nations Special Rapporteur Louis Joinet described an evolving “process by which the international community has become aware of the imperative need to combat impunity.”¹ As the human rights movement gained momentum and experience, global efforts to end the depredations of “dictatorial regimes”² had led to an inexorable conclusion: human rights violations thrive in a culture of impunity. Another writer made the point this way: “Impunity . . . is the dictator’s greatest and most potent weapon. It is the victim’s ultimate injury. . . . Impunity . . . [is] one of the most prevalent causes of human rights violations in the world.”³

In 1997, Mr. Joinet made a landmark contribution to the campaign against impunity by developing a “Set of principles for the protection and promotion of human rights through action to combat impunity.”⁴ The essential wisdom of the Principles lay in their underlying premise—that human rights violations are sure to proliferate unless States implement a *comprehensive* set of anti-impunity measures. For if *impunity* literally means exemption from punishment, the Joinet Principles implicitly recognized that a culture of impunity—the context in which atrocious crimes flourish—arises from systemic, cumulative and specific failures. Elaborated in forty-two principles,⁵ the core components of Joinet’s basic code of protection comprise effective measures for assuring the rights to justice, truth, and reparations, as well as other guarantees of non-recurrence of human rights violations.

When asked by the UN Secretary-General to assess recent developments in global efforts to combat impunity, I found and reported that, by 2004, the principles drafted by Joinet “ha[d] already had a profound impact on efforts to combat impunity”⁶ and recommended that they be updated to reflect such recent developments as the creation of the International Criminal Court.⁷ The following year the Secretary-General appointed me to undertake that task.

Recognizing that recent developments had provided powerful affirmation of the principles devised by Joinet, I understood my task to be to update rather than revise them. The Updated Principles, which were endorsed by the Commission on Human Rights during its final session in 2005,⁸ reflect both key developments in international law and practical insights concerning effective strategies for combating impunity gleaned from an ever-expanding reservoir of experience. Perhaps most important in the latter regard, the Updated Principles emphasize “the central importance of promoting the broad participation of victims and other citizens . . . in the design and implementation of programmes for combating impunity.”⁹

The new initiative for mapping, monitoring and combating impunity launched by Impunity Watch represents another, invaluable, step forward in global efforts to tackle the pernicious effects of impunity. Based upon an empirical, cross-regional analysis of the daily dynamics of impunity, Impunity Watch has developed a comprehensive tool for identifying and addressing its root causes.

Notably, Impunity Watch is committed to working with local partners in each phase of its work—in adapting its methodology to capture the unique features of each society in which it works; in developing effective strategies for addressing deficiencies in institutional and political capacities for preventing transgressions; and, of course, in working to enhance local capacity to assure reliable protection of fundamental rights. Thus while global in its relevance, the new initiative of Impunity Watch reflects the insights and honors the agency of those who serve on the frontlines of change.

This approach is likely to enhance the effectiveness of the strategies that evolve from Impunity Watch’s work. For as I wrote in my 2004 study on impunity, a key “factor behind successful programmes” for combating impunity “is the broad participation of citizens, including victims, in deliberations about their design.”¹⁰

In short, Impunity Watch has launched an important and promising initiative for transforming the abstract principles of international human rights into the daily practice of States.

- 1 Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 1 (2 October 1997).
- 2 *Id.*, 2.
- 3 Mary Margaret Penrose, “Impunity—Inertia, Inaction, and Invalidity: A Literature Review,” 17 *B.U. Int’l L.J.* 269, 270 (1999).
- 4 Revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, Annex II (2 October 1997).
- 5 The Updated Set of principles for the protection and promotion of human rights through action to combat impunity comprise thirty-eight principles. See UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005).
- 6 Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88, 8 (27 February 2004).
- 7 *Id.*, 65.
- 8 CHR Resolution 2005/81, 21-23.
- 9 Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88, p. 2 (27 February 2004).
- 10 *Id.*



The instrument presented here has been created by a group of analysts, researchers and practitioners associated with the Impunity Watch project. It, and the research it is designed to guide form the heart of a comprehensive approach that Impunity Watch has conceived in order to contribute to reducing impunity for serious crimes against international law.

A legacy of past crimes still determines the present and threatens the future of many nations, despite the growing range of judicial and non-judicial mechanisms that governments have at their disposal for addressing it. Even where attempts have been made at institutional reform, prosecutions, reparations, vetting or truth-seeking, impunity can remain a pervasive factor of social and political life, both sustaining and sustained by a nexus of institutional inadequacies and personal and political interests. Often it seems that the only thing matching the resilience of impunity is the determination of the victims of crimes to obtain redress and recognition of the injustices they have suffered.

Conflicts accompanied by mass crimes cause damage across the board – they impair state institutions, exhaust resources, divide and traumatise populations and may involve or create a myriad of groups that stand to benefit from a lack of accountability and transparency about the past.

This is why identifying the underlying the root causes of lingering impunity goes beyond the purely technical or institutional, and can involve complex cultural, social, and political factors. The causes may lie in an inadequate legal framework, chronic under-resourcing of institutions, a lack of independence or willingness to tackle the problem, the absence of the political will to deal with the legacy of past crimes, the influence of powerful interest groups and a society in which impunity is an expected norm – or in any combination thereof. Impunity Watch believes that the impact of mechanisms that are designed to provide redress to victims and guarantee the non-recurrence of atrocities will improve if due attention is paid to understanding the obstacles they are encountering and creating targeted policies to address them. This research aims to uncover and analyse these obstacles.

Our research process is based on a commitment to home-grown capacity and ideas, and to involving those who are affected by policies responding to past crimes. Failure to obtain the input from such groups can mean that sometimes even the best-intentioned national and international attempts to reduce impunity cannot produce a sustainable national capacity and support for these efforts, a point of guidance made by the former UN Secretary General in his seminal Report *The Rule of Law and Transitional Justice* of August 2004.

The Impunity Watch comprehensive approach was designed to put this advice into practice. We work with national civil society organisations in selected countries to identify the root causes of impunity, create the most appropriate policy proposals to tackle the specific obstacles identified, and advocate for their implementation. The policy proposals will be based on the results of methodologically rigorous research guided by this instrument. The research will be conducted together with leading civil society actors and with the input of local and international experts. The results of this research will also form the basis for national monitoring programmes. Using the information and analysis from the research, specific targets will be set for the institutions responsible for implementing mechanisms for responding to past crimes. Local civil society actors can then use indicators to monitor progress towards those goals.

In this way, we seek to offer quality research and policy proposals and at the same time support civil society actors who work in the field of accountability and human rights. We hope that the joint effort will result in strengthening their capacities for research, oversight and monitoring, as well as for policy design, advocacy and lobbying. By joining our efforts with those affected by transitional justice policies, Impunity Watch aims to assist national and international decision-makers to avoid a one-size-fits-all approach to combating impunity and to ensure sustainability and broad support for their efforts.

Research guided by this instrument is currently under way in Guatemala and Serbia, with the first country reports and policy recommendations scheduled to become available in mid-2008. We hope our approach will prove to be useful to all those trying to help these two countries and many others around the world come to terms with the past.



IW has designed this research instrument with two aims in mind:

- (i) To identify the root causes of impunity in a given situation, and
- (ii) To provide a basis for the evaluation and future monitoring of states' compliance with their international legal obligations to respond to serious crimes and gross human rights violations.

In relation to the first aim the research instrument is focused on identifying the root causes of impunity: obstacles to processes that have been designed to provide victims with information, criminal justice and reparations as well as obstacles to other measures aimed at avoiding the recurrence of past crimes. This focus follows the recently updated United Nations “**Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity**”¹¹ which make reference to victims' rights to truth, justice and reparations and the need for measures to guarantee non-recurrence of the atrocities suffered by them.

As to the second aim the information collected during the research and the reports resulting from it will provide a baseline upon which monitoring tools can be created. These tools can be used by national civil society groups in locally based programmes to monitor states' efforts to remove the root causes of impunity and to comply with their legal obligations to provide information, to investigate and prosecute and to provide reparations. The research has been designed to expose and examine in detail any obstructions to a wide range of transitional justice processes.¹² It will facilitate the setting of targets or objectives to promote improvement within the relevant institutions focused on specific problem areas. In this endeavour, IW will be working with local organisations to help create monitoring tools that can measure the states' progress towards the achievement of realistic and relevant targets on combating impunity. Indicators of progress will be designed based on relevant information identified during the initial research. While the focus of the monitoring will be squarely on states' compliance with their specific *legal* obligations, targets will be framed in light of recent developments in the area of international standard-setting such as the above mentioned **Principles on Impunity** and the “**Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**”.¹³ The research is of course not limited to situations of alleged state involvement in crimes and violations but covers circumstances where the state institutions have to respond to victims of crimes committed by non-state groups or individuals.

11 Drafted by Louis Joinet in 1997 at the request of the then U.N. Sub Committee for the Prevention of Discrimination and Protection of Minorities (see E/CN.4/Sub.2/1997/20/Rev.1.) In 2005, at the request of the U.N. Human Rights Commission they were updated by Diane Orentlicher (see E/CN.4/2005/102/Add.1)

12 In this document 'transitional justice processes' refers to non-judicial commissions of inquiry, criminal justice and reparations initiatives as well as measures aimed at guaranteeing non-recurrence of past atrocities. In the latter category one finds disbandment of armed groups and a wide range of institutional reform measures.

13 Adopted by the U.N. General Assembly in March 2006 A/RES/60/147. The Human Rights Commission initiated the drafting of these principles and the project was overseen by the UN High Commissioner on Human Rights.

KEY AREAS OF RESEARCH

The research will attempt to locate obstacles to information disclosure (sometimes called “truth-seeking”), criminal justice reparations and non recurrence measures in six key areas spanning institutional, technical-legal, social, cultural and political issues:

- Normative framework (the laws and regulations applying to the processes)
- Resources and capacity (of the institutions responsible for their implementation)
- Institutional independence and willingness (of the implementing institutions)
- Political will (the willingness of the political organs of state)
- Entrenched interests (covering individuals or groups influencing the processes)
- Societal factors (from poverty and race to language and culture)

In this research instrument, a chapter is dedicated to each of these areas of research and within each chapter questions are organised in four sections around the rights to truth, justice, reparations as well as other efforts to ensure non-recurrence. These questions cover a range of topics and, of course, there is a degree of overlap between the categories. As far as the issue of non-recurrence is concerned, IW has decided to focus a limited inquiry on three issues: (i) vetting (ii) lustration and (iii) the disbandment of armed units implicated in crimes or human rights violations (SCUIL), the reintegration of fighters into society, and the demobilisation of all child soldiers.

USE OF THE INSTRUMENT IN COUNTRY RESEARCH PROGRAMMES

This is a global research instrument, designed as a blueprint that will be adjusted by local researchers in cooperation with IW to ensure its relevance for the country context in which it is to be applied. These modifications are aimed at ensuring that the research focuses on the crimes and violations, the institutions and societal realities of the country in question in order to provide as rich a coverage of the issues as possible while retaining the potential for a certain, albeit more abstract, level of cross-country comparative analysis. Certain core topics of inquiry within the instrument are covered in all country research programmes and that consistency and quality of information collection and analysis activities is maintained.

State institutions and other relevant bodies or persons in relation to which conclusions are made will be given the opportunity to comment prior to final publication of the research results. In some cases the conclusions of IW reports will be novel or will refer to new information obtained or recently systematised during the research. In others, the conclusions may reiterate positions or claims that have already been made or suggested, and to which the institutions or persons concerned have already responded publicly or privately. In either case, given the detailed nature of this particular inquiry, the ultimate objective of policy formulation and in the basic interests of fairness and complete information, comment will always be sought from the body or person in question.

Impunity Watch claims author's rights on this instrument. Only reports that have been produced as a part of an officially recognised Impunity Watch country programme under the methodological supervision of Impunity Watch may use the Impunity Watch name and logo. Such reports will be endorsed by our organisation and enjoy our public support.

STRUCTURE

- A general introduction is given for each chapter.
- Thereafter additional general explanatory notes and instructions directed to researchers are to be found in green text. Specific protocols on information collection and analysis are provided separately to in-country researchers.
- Questions in each of the subsections are not numbered since this is a global document. Researchers will, following adjustment of the instrument for use in country programmes, enumerate all questions and log the information they collect accordingly.
- In all the chapters and subsections, various different types and sources of information on the same topic are deliberately sought in combination.



This chapter refers to both international and national law. Its purpose is to set out the *de jure* situation in relation to:

- The state's obligations¹⁴ to respond to serious crimes and gross violations of human rights under international law.¹⁵
- The broader legal framework relevant to the state's ability to fulfil those obligations.
- The relevant laws, if any, which implement the state's efforts to ensure non-recurrence of such crimes and violations.

The overall research question in relation to normative framework is whether and how specifically does the normative framework obstruct or facilitate transitional justice processes.

1.1 BASIC LEGAL INFORMATION

This section seeks to identify the legal obligations of the state to respond to the crimes and violations under examination according to *international law* (specifically criminal and human rights law) and under the national legal framework. The obligations relate to carrying out domestic prosecutions, cooperating with any international or semi international bodies having criminal jurisdiction over the crimes and violations and obligations to provide other types of remedies including information and reparations.

1.1.1 International law: general

- List the relevant international instruments to which the state is a party (from a checklist of international and regional instruments which will be provided.) This should be accompanied by a timeline showing the date when each entered into force.

This information will allow the identification of the legal obligations of the state against which compliance will later be assessed. The IW legal adviser will add additional obligations based on customary or general international law. The timeline of ratifications of these various instruments allows comparison with the timeline both of the reported atrocities and of the entry into force of relevant domestic criminal law provisions. Whether ratification of a specific treaty also indicates compliance - for example ratification of an extradition treaty to allow a third state to prosecute - will be determined as part of the separate compliance monitoring.

- List the regional or international bodies whose competence the state has accepted (from a checklist of bodies having the relevant jurisdiction and competence over the crimes/violations being studied.) This should be accompanied by a timeline showing the dates of the declarations of acceptance. List any foreign states having jurisdiction over the crimes.

14 The *de jure* state legal commitment to respond to the crimes and violations will be compared to its *de facto* responses, examined in other chapters of the instrument.

15 The crimes and violations in question are contained in the Annex to the instrument. As explained in the annex, the list may be tailored to the factual circumstances of the country being studied.

Jurisdiction is not limited to criminal jurisdiction since the inquiry covers non criminal law responses to human rights violations. Examples of bodies to which this question refers include those of the Inter-American/European/African Human Rights systems, the ICC *ad hoc* international or “hybrid” tribunals, non judicial commissions of inquiry, the Committee against Torture and the U.N. Human Rights Committee. The checklist will of course include only those bodies having the requisite territorial, material and temporal jurisdiction.

- List the state’s membership of regional or international bodies (from a checklist which will be provided) that have a normative framework relevant for the investigation and prosecution of international crimes or human rights violations and/or the provision of remedies to victims. This should be accompanied by a timeline of dates of membership.

Examples would include bodies whose members undertake to abide by human rights norms or even to engage in mutual criminal cooperation, such as the African Union, Council of Europe or the Organisation of American States.

- Do the decisions of the regional or international bodies of which state is a member, or whose jurisdiction it has accepted, have legal effect under national law? Do individuals affected by those decisions have recourse to national remedies to enforce them?
- Do any specific agreements exist between the state and regional or international bodies in order to allow them to carry out investigations and fact-finding missions covering the crimes/violations being studied? If so obtain a copy and include the body in the right to justice section below.

1.1.2 Domestic law and constitutional framework: general

- What is the status of international law according to the constitution?

This should not be original research but a *summary* of the position referencing if necessary case law or existing juridical study.

- List the legal rights recognised in the constitution that relate to the provision of information, payment of damages and other legal remedies for harm using a checklist. Note against each right any permissible exceptions, suspensions or derogations and any procedures that victims or their families are legally required to use to invoke these constitutional rights.

The checklist will be prepared with input from country researchers. Examples would include the right to information generally and *habeas data*, the right to sue the state for damages, the right to redress for wrongdoing by the state and *habeas corpus*.

- Does the constitutional or the general legal framework provide for judicial review of the decisions of public officials and of legal decisions in any court proceeding?
- According to national law, on what basis if any can the above-listed rights (to information, damages for harm, remedies) and the right of judicial review be suspended or derogated from?
- Does the country have any bodies (for example a Constitutional Tribunal) with specific powers to review and abrogate legislation, to control judicial decisions with respect to human rights, or to decide about the application of international law?

If so, apply the research questions regarding *Resources and Capacity and Independence and Willingness to this body.*

- Does the country have an Ombudsman’s office, or similar body, which can receive petitions from individuals or groups who have been victims of the crimes and violations being studied? Can a victim’s family member or other person who has information also make petitions?
- Does the body have any powers to conduct investigations into the actions of public bodies, and to give specific recommendations for the fulfilment of human rights?

If so, apply the research questions regarding *Resources and Capacity and Independence and Willingness to this body.*

- Does the domestic normative framework limit in any formal way the right to seek information, to initiate or participate in criminal proceedings or to apply for reparations on a discriminatory basis? (For example, does the law require that a male relative make a complaint on behalf of a female victim? Are children legally prohibited from giving evidence?)
- List all the relevant definitions of “victim” under domestic law (including the constitution) as well as definitions of any other person or group that has legal standing to claim or otherwise participate in processes of information disclosure, criminal prosecution or reparations for the crimes or violations being studied.

1.1.3 Special, “traditional” and “alternative” mechanisms

In addition to tribal or community systems such as those used in East Timor and Rwanda, this section covers mediation or alternative dispute resolution mechanisms, including where initiated by the state or non-state groups. It also includes mechanisms that involve partial criminal initiatives mixing or exchanging information disclosure, prosecution/amnesty, sentence reduction or reparations.

- Does the domestic system provide a legal basis for, or at least legal recognition of, traditional and alternative mechanisms for providing information, reparations or criminal justice to victims and families?¹⁶
- What was the role, if any, of the state in the creation or implementation of the mechanism?
- Obtain the normative bases (if written) or using reliable studies outline:
 - How is the mechanism’s intervention triggered?
 - Which crimes or violations does the mechanism deal with?
 - Which categories of alleged perpetrators can it process?
 - What type of participation in the crimes/violations does it deal with?
 - Which time period does it cover?
 - What defences or mitigating factors does it allow?
 - What penalties can it impose?
 - Who takes decisions about outcomes? Obtain the regulations on how these persons are appointed and removed.
 - Who can appeal and to which body?

16 In some countries facing problems of impunity, the justice system may be regarded as at best irrelevant by a significant part of the population. Many of these systems lie outside the geographic or economic reach of victims, and that in certain situations the very system responsible for responding to victims’ needs had previously been complicit in the atrocities they suffered or had defended the interests of those responsible. Traditional mechanisms or other parallel systems if they exist may in some situations provide prompt and effective remedies parallel to or in place of official systems for responding to mass atrocities. However in addition to problems of state recognition and resources, the design of such systems may not have contemplated providing responses to these most serious of crimes or the forms of responsibilities at issue including of persons at the highest levels of civilian and military power. The research will attempt to situate systems of this sort among available responses to atrocities.

- How can the decisions taken be enforced?
- How do victims participate if at all?
- Obtain any regulations regarding the funding of the body.

1.2 NORMATIVE FRAMEWORK OF THE RIGHT TO KNOW

The purpose of this section is to identify those laws and rules that govern the provision of information to victims, families and the public about past crimes and to discover if these laws or rules (or lack thereof) obstruct disclosure in any way.

General issues:

- Do individuals have a right under the constitution or other domestic law to have access to any information *about them* held by the state or other private bodies? (*habeas data*) Attach or cite the relevant legislation.
- Do individuals have a right under the constitution/other domestic law of access to general information held by the state (*freedom of information*)? Attach or cite the relevant legislation.
- What are the exceptions and exemptions¹⁷ to access to information (whether about oneself or generally)? Which authority makes the decisions? Is there an appeal process?
- Do domestic laws or regulations impose an obligation on the state to preserve information and regulate its disclosure and destruction? List the relevant provisions and dates on which they came into force.
- Do domestic laws or regulations oblige the state to provide the public with access to archives and do they also regulate the access procedure?
- Does the state have an official secrets law for public servants? What is the sanction for breaching the official secrets law? What are the exceptions under which an official may divulge information?
- Is it a crime for a public servant to destroy information that came into his possession through his employment? What is the penalty?
- Does the criminal law allow for mitigation of criminal sentences if the convicted person provides information to the authorities about the commission of crime - for example the locations of disappeared persons or of evidence, or information regarding the involvement of other individuals in the commission of a crime?
- Does the law provide for public access to watch criminal proceedings related to the crimes or violations being studied? Does the law allow for televised broadcasts or streaming of such proceedings? What are the major restrictions on publicity?

¹⁷ Exceptions would ordinarily relate to information to which the law does apply but where if all or part of that information falls within a certain category it is permissible to refuse disclosure. Exemption generally relates to identification of whole institutions or categories of information to which the laws on freedom of information simply do not apply.

1.2.1 Non-judicial commissions of inquiry¹⁸

This refers to any body which is the product of a specific agreement as mentioned above at 1.1.1, for example non judicial commissions of inquiry, UN fact finding bodies, etc. The researcher should collect all of the relevant material on these bodies: their laws, regulations, powers, mandates, and details on its operations, internal rules and structures.

- If a non-judicial commission of inquiry (“NJCI”) operated in the country, how was it created? Examples would be: through national legislation, by agreement between the state and U.N. or a regional body. Attach a copy of its founding document(s) and any documents showing its mandate, composition, powers, immunities, internal rules, structure, relationship with state and state institutions, the methodology it used (e.g. interviews, hearings, document collection etc.)
- What roles, if any, did (i) the state (ii) foreign states, international or regional bodies (iii) all parties to the armed conflict (iv) civil society or other national groups have, if any, in creating the body, defining its mandate and operations and/or overseeing its functioning?
- Did the normative framework cover the enforcement and implementation of the recommendations of the commission? If so cite the provisions.
- Did the normative framework require dissemination of the commissions’ findings, how and in which form?
- Did the normative framework provide for the participation of victims, relatives and civil society in the work of the body? If so briefly note how this participation was regulated.
- Did the normative framework provide for public hearings? If so cite the provisions.
- Did the normative framework of the body offer confidentiality to those providing information leading to the identification of perpetrators, or to the location of disappeared or deceased victims? If so cite the relevant provisions.
- Did/does the body’s mandate require it to allow the public to have access to the non- confidential information it collected? Note how and when this was achieved, noting also the date of publication of the commissions’ final report.

1.2.2 Forensic investigations

This section focuses on the way in which the work of forensic teams can provide information to survivors, families and the public. This largely depends on the way in which the teams work and what happens to the results of their work. Information is sought which can show whether the normative framework under which forensic teams work is facilitating or obstructing disclosure of information and which can illustrate what role, if any, the state plays in the processes. Necessary cross-references to the section of this chapter on the right to justice should be made.

- List the legal regulations governing who can ask for, authorise and perform forensic activity.

This should not be limited to excavation of mass graves but should include all crime scene activity and analysis including ballistic and explosives analysis, photography, fibres etc.

18 Non-judicial commissions of enquiry have been given different names such as investigative commission, truth commission, truth and reconciliation commission, truth and justice commission and historical clarification commission.

- Do the domestic laws or regulations require fees to be paid by the victim or by their family or representative to the authorities or the forensic team? If so, specify.
- What do the domestic laws or regulations say if anything about allowing families access to see human remains or other material and to obtain copies of analytical reports (independently of whether a prosecution follows and irrespective of their legal standing in such a prosecution)?
- What do the domestic laws or regulations say if anything about the victim or family's powers to retain an independent expert to carry out examination and analysis? Who must cover the costs?
- Is there a national plan on forensic investigation including exhumations? If so provide a copy.
- What role does or did the state play in designing or implementing such a plan?
- Do records exist which could show instances of (i) human remains having been excavated at locations other than those where killings are reported to have taken place (ii) crime scenes being cleaned, bulldozed or otherwise tampered with? If recorded instances are known, note them (place, date, brief description)

Note information that would indicate attempts to tamper with or destroy potential evidence. If there is a large amount of such allegations, simply provide the number and reference the source(s.)

1.2.3 Archives (including “registries”)

In this section “archive” means any stored information relating to the commission of or participation in the crimes and human rights violations being studied. It includes reference to information about victims and the structure and functioning of groups or institutions that are alleged to have been responsible. Bear in mind any distinctions between seeking information about oneself (*habeas data*) and seeking general information from the state. Of particular interest are registries of disappeared persons. Note also that archives may be held by the state or private bodies and that information can be sought also from non state parties to a conflict.

- Which archives exist relating to the crimes or violations being studied? What kind of information do they hold? Attach the legal or regulatory provisions if any establishing the registry/archive, and defining its mandate, structure, powers, resources, delimiting who may access it and creating the procedures for obtaining information from it.
- What role if any did/does the state play in establishing or maintaining the archive?
- Do the laws or regulations require that applicants
 - receive a reply within a specified time,
 - receive reasons for rejection of their request,
 - have an appeal against rejections,
 - have the right to correct or add to personal information stored?
- Are the archives subject to data protection laws and confidentiality regulations?
- Do records exist which could show instances of unlawful destruction of or tampering with archives that contain information of a potentially incriminating nature in relation to one or more parties to the conflict?

1.3 NORMATIVE FRAMEWORK – RIGHT TO JUSTICE

1.3.1 Domestic level

- In relation to the following crimes and human rights violations, indicate whether this type of crime¹⁹ is included in the *domestic criminal law* (whether this takes the form of a criminal code or common law) and give the name and definition of the crime as it appears there²⁰:
 - **Genocide**;
 - **Killings** (whether as a crime against humanity, war crime²¹, or violation of the right to life as defined in human rights law);
 - **Enforced disappearance** (whether as a crime against humanity or as otherwise defined in international human rights law);
 - **Torture** (as a crime against humanity), **cruel treatment** (as a war crime) or any act qualifying as torture or other **cruel inhuman or degrading treatment** according to international human rights law;
 - **Sexual violence** (as a crime against humanity or war crime or amounting to a violation of a non derogable international human right);
 - **Persecution** (whether amounting to a crime against humanity or comparable deprivation of fundamental human rights);
 - **Deportation or forcible transfer** (commonly called forced displacement) amounting to a crime against humanity.
- Again for each of the above, independent of whether the national law includes these specific crimes, could the same physical actions (sometimes referred to as constitutive acts or *actus reus*) prohibited by international law be charged as an alternative or additional crime under national law? Give the name and definition of that crime.

Examples might include murder rather than ‘killing’, kidnapping rather than ‘disappearance’, rape or assault rather than ‘torture.’ Note this relates only to the action, not to the contextual elements such as connection to an armed conflict or to a widespread or systematic attack on a civilian population.

- Does the domestic law provide for statutory limitations (prescription laws) that apply to any or all of the crimes listed above?
- Do amnesty laws exist which cover these crimes and do they apply to both the time period being examined and to the alleged perpetrators? If so, attach the regulatory framework with a short note on who can apply, what the procedure is, whether the law affords the applicant immunity from investigation, from prosecution, from conviction or only from serving a sentence?
- Is the provision of amnesty linked to disclosure of information, payment of reparations or any other action on the part of the applicant? Do the procedures include provision for challenges to be made to a grant of amnesty?
- Is there a register of persons who have been granted amnesty? If so, give brief details of content, location and who can have access to it.
- Does the domestic criminal, military or other applicable law allow for a defence or mitigation that is based on following the orders of a superior? If so, attach the relevant provisions.
- Does the domestic law provide for the granting of pardons to persons convicted of criminal offences (including all the crimes listed under the first two questions of this section)?

19 See the Annex at the conclusion of the instrument for explanation of the definitions used here.

20 Since the domestic law may not exactly replicate that of international law names and definitions.

21 This term is intended to cover violations of international humanitarian law and is not restricted to grave breaches of the Geneva Conventions.

- Outline briefly in which way, if any, victims of these crimes and their family members can participate in criminal proceedings, whether at investigation or prosecution stage.
- Do domestic laws or regulations provide for a witness protection procedure? If so, specify briefly the body responsible and the procedure, criteria and measures applied.
- List the domestic legal provisions protecting the rights of the accused in criminal proceedings.
- Do domestic laws offer immunities to certain classes of individuals?²² If so, attach the relevant provisions. Is there a procedure under domestic law to challenge the grant of such immunity?
- Is there any legal prohibition, limitation or special procedure for the investigation or prosecution of persons based on their official position?²³ If so, attach the relevant provisions. Which body or individual makes the decision? Is there a procedure to challenge that decision?
- Have any third countries granted asylum or permission to remain to persons alleged to have committed the crimes in question? Vice versa: Does the country being studied itself have a prohibition on offering protection to individuals accused of committing such crimes?²⁴
- Do any exceptions exist in national law to the *ne bis in idem* protection (the prohibition on being tried twice for the same conduct)? If so which?
- What forms of criminal participation exist in the national criminal law? (Copy of the relevant legislation or brief list.)
- Does national criminal law make institutional superiors criminally liable for the conduct of their subordinates? Is there any other form of comparable liability?²⁵

1.3.2 Special jurisdictions – domestic and international

This covers special and ad hoc procedures and military jurisdiction under national law including any equivalent that exists for the security forces, though note that the fact that military tribunals or international tribunals deal with such cases is not automatically a negative or positive respectively in terms of impunity. Also, at international level, it relates to ad hoc tribunals, hybrid tribunals, the ICC and any ad hoc international investigative bodies with jurisdiction over the specific crimes being studied. The cooperation framework with these bodies will be later compared to actual levels of cooperation.

- Obtain the normative bases of any bodies having special (concurrent, complementary or exclusive) jurisdiction over the relevant persons or crimes being studied.
- Which crimes does the body/system have jurisdiction over?
- Which persons does it have jurisdiction over?
- Which time period does it have jurisdiction over?
- What forms of criminal responsibility does it deal with?
- What defences/mitigating factors does it allow?
- What penalties can it impose?
- Does it have rules of prescription?
- Who takes decisions over charging, responsibility and sentencing? Obtain regulations on how these people are appointed and removed.

²² For example heads of state, ministers and parliamentarians.

²³ Including their position in non-state armed groups, for example where anti-government armed forces have assumed political power and passed such laws.

²⁴ For example, if they are States Parties to the 1951 UN Convention relating to Refugees, under article 1F of that Convention, persons may be excluded from protection if they have been involved in serious crime.

²⁵ For example liability in tort (delict), or liability of military superiors under military codes.

- Who can appeal and to which body? Obtain the regulations on how those who decide appeals are appointed and removed.
- How can the decisions taken by the body or bodies be enforced?
- Obtain any regulations regarding the funding of the body.
- What roles, if any, did (i) the state (ii) foreign states, international or regional bodies (iii) all parties to the armed conflict (iv) civil society or other national groups have, if any, in creating the body, defining its mandate and operations and/or overseeing its functioning?
- What, if any, are the differences between national law and the statute or regulations of the relevant body regarding the definition of the crimes listed above in the first question of this section?
- In the case of non domestic bodies²⁶, obtain the provisions of national law on the basis of which the national authorities can engage in cooperation with that body or with any foreign states that are seeking to exert jurisdiction?

Examples include state cooperation on issues of extradition, transfer, entry into territory of investigation teams, transfer of evidence, “use immunity”, recognition of foreign judgments etc.

- Does the body allow for and regulate the participation of victims and the protection of witnesses?

1.4 NORMATIVE FRAMEWORK ON REPARATIONS

1.4.1 Legal recognition of the right to seek reparation

- What are the relevant provisions of domestic law (including civil, criminal or constitutional law) regulating claims for reparations against the state or against persons whose acts are attributable to the state²⁷ List also the relevant national laws on state immunity.
- Are there limitations on who can claim reparations? Do time limits apply to claims? Is there an appeals procedure?
- If the harm was caused through criminal conduct, must a victim or family member also make a criminal complaint in order to claim reparations? Can they make a civil claim notwithstanding an acquittal or abandonment of criminal proceedings?
- How do these rights to seek reparations relate to the *special jurisdictions* mentioned above?

For example, can victims seek reparations in relation to acts of military or security personnel, under regulations of military or security processes? Can they seek reparations within the framework of an international tribunal or other body? Can there be processes in both national and international bodies running simultaneously?

²⁶ For example hybrid tribunals and international tribunals.

²⁷ Attribution as referred to here is intended to coincide with the concept of state responsibility in international law, and so is not restricted to definitions which have been generated in the jurisprudence of the various human rights bodies created by treaty and by other mechanisms. See Articles on the Responsibility of States for Internationally Wrongful Acts, Part II http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

1.4.2 Existence of regulations that create or establish reparations²⁸ programs.

- Does a special body exist to process and administer claims for reparations by victims of the crimes and violations being studied or their family members? If so, obtain its founding document(s) and any documents showing its mandate, composition, powers, immunities, internal rules, structure, relationship with state and state institutions, the methodology used to approve or reject claims and to process appeals.
- Are there limitations on who can apply to this body? Do time limits apply to applications?
- Obtain the laws, regulations or otherwise documented norms covering the following issues:
 - How was the body created?
 - Does it receive applications for reparations for the crimes and violations being studied (or of constitutive acts)?
 - Which time period of crimes/violations does it relate to?
 - Who takes the decisions to approve, reject and quantify the reparations?
 - How are those decision makers appointed and removed?
 - What types of reparation can be awarded?
 - Are there clear criteria used to determine the claims?
 - Is there an appeals procedure and recourse for delays or failures to respond?
 - How are the awards enforced?
 - Does the state have any legally defined overriding decision-making power in relation to specific awards?
 - Attach the regulations regarding funding of the body
- What roles, if any, did (i) the state (ii) foreign states, international or regional bodies (iii) all parties to the armed conflict (iv) civil society or other national groups have, if any, in creating the body, defining its mandate and operations and/or overseeing its functioning?
- Does making a claim for reparations or the receipt of reparations from this special body require that victims or families waive other rights?

Examples of such rights would include the right to bring a criminal complaint, to sue in civil courts or take the same case to regional or international bodies.

- Is the body mandated or obligated to publicise its existence and the procedures for making claims, including in areas where victims or their families live? If so give brief details.

This includes situations where claimants are not present in the country in which (or from which) reparations can be claimed.

- In cases of death or disappearance followed by killing, do the relatives have a legal right under national law to the return of the body for burial (either through a special body or the general legal system)?

²⁸ This is understood to cover programmes capable of providing any type of recompense to victims.

1.5 NORMATIVE FRAMEWORK – GUARANTEES OF NON RECURRENCE.²⁹

1.5.1 Lustration

If laws exist in the country to remove from public office persons alleged to have been involved in committing the serious crimes or violations under study:

- How was the law initiated? (Include a brief explanation of the role of international and national actors).
- Obtain the relevant laws and regulations under which persons may be removed from public office, and which regulate the following issues:
 - Which body is to administer the system of lustration
 - The institutions that are affected
 - The levels, posts and individuals within that institution that are affected
 - The criteria for removal. (Note any discriminatory criteria³⁰)
 - Decision making and appointment or removal of the decision makers
 - Publicity of decisions made
 - What can be ordered in which circumstances? (For example permanent or temporary removal, suspension. etc.)
 - Right to reasons and available defences for those affected
 - Appeals procedures available to those affected

Analysis of the information gathered on this topic for the final report should include a comment on the consistency of the normative framework (as opposed to the *de facto* implementation) of such processes with the requirements of due process of law and the principle of non-discrimination. Researchers should refer to an appropriate comparison, for example human rights provisions on due process found in the country's constitution or treaties it has ratified.

1.5.2 Disbandment and Reintegration

Does a national programme of disbandment and reintegration of unofficial armed groups and paramilitaries³¹ exist? If so:

- Are these groups alleged to have been involved in the commission of any of the crimes and violations being studied?
- Do legal provisions³² exist regulating investigations into the activities of such groups? If so attach.
- Do legal provisions exist regulating investigations into any links between such groups and State institutions, including in particular the army, police, intelligence, and security forces? If so attach.
- Do laws/regulations exist governing the reintegration of former members of these groups into society? Obtain provisions including on eligibility.
- Are there any norms and regulations specifically targeted at children who have been recruited or used in hostilities, in order to demobilise them and to provide appropriate assistance for their physical and psychological recovery and their social integration?

29 This section has been designed with reference to the Joint-Orntlicher principles and UNDP Operational Guidelines for Vetting Public Employees in Post Conflict Settings, 2006. The phrase "guarantees of non recurrence" is extracted from the Joint-Orntlicher principles. The research will limit itself to vetting, lustration and some aspects of disbandment of parastatal and unofficial armed groups and reintegration of their members. It will not cover all areas of post conflict or post authoritarian institutional reform.

30 In the sense of factors other than the person's links to the former regime, armed group or other body alleged to have been responsible for or complicit in the crimes and violations under examination. If only one of such bodies is singled out in the process this might be included as discriminatory.

31 Joint-Orntlicher Principle 37, supra note 5.

32 "Legal provisions" includes primary legislation and all forms of subsidiary regulation including administrative provisions.

1.5.3 Vetting

If there is a system for vetting all persons seeking employment in one or more state or public³³ organs:

- How was the system initiated? (Include a brief explanation of the roles of international and national actors.)
- Researchers should obtain the relevant laws and regulations under which persons may be vetted for public office and which regulate the following issues:
 - Which body administers the process
 - Whether the checks relate to prospective or current public employees
 - The institutions that are affected
 - The levels, posts and individuals within each institution that are affected
 - Whether the checks relate to potential involvement in the crimes or violations being studied
 - Decision making and appointment and removal of decision makers
 - For those seeking employment - what decisions can be made. (For example a ban on future employment in public service or other areas of employment.)
 - For those currently in office (where the process vets applicants for promotions or transfer and suchlike) - what decisions can be made. For example no promotion, demotion, suspension, application of lustration law.
 - Whether the information is made public and if not whether it is passed to criminal authorities, non-judicial commissions of inquiry or to any other body
 - Right to reasons and available defences for those affected
 - Appeals procedures available to those affected
 - Recording of outcomes
- Under domestic law, are there regulations governing whether former military or security force personnel, or any person who is serving or has served³⁴ in state institutions implicated in the crimes and violations being studied, can stand for election or be a candidate for political posts? If so provide a copy. Note whether challenges may be brought against this bar to office, whether by the person affected or by other individuals or groups.

1.5.4 General non-recurrence measures

- Since the crimes and violations occurred, has the state become a party to human rights or other international instruments that relate to the protection of persons from the same or similar crimes and violations that occurred in the past or that relate to the prevention and punishment of this type of crime or violation? If so, specify which.
- Since the crimes and violations occurred, has the state made any changes to domestic law to further the provision of information, reparations or criminal justice for victims and families? Specify.

Examples would include new provisions on prescription, additional or new definitions of crimes consistent with international law, or addition of new crimes to the criminal code.

33 The distinctions between the two should be kept in mind throughout the research and analytical process. While under state institutions we include all bodies that are part of or under the responsibility of the country's executive, under public body we include those bodies which have a role in the processes of national government, but are not a government department or part of one, and which have at least formal independence in their own policy-making irrespective of their structure (public broadcasting companies, state universities, state-financed training centres etc.); exceptionally bodies that may be private by their ownership structure but fulfil a public role can therefore also be subject to lustration and vetting (large privately owned media, for instance)

34 Where the period of service coincides with period during which it is alleged that the institution was involved in the commission or covering up of the crimes or violations under examination.

- Is the state a party to the Statute of the International Criminal Court? ³⁵
- Can new rights be incorporated into the country's constitution through decisions of judges?

This does not justify negative or positive evaluations but merely completes a factual mapping of how the normative system works.

- Are there regulations in the country requiring schools to teach about the period of conflict or repression including about the commission of serious crimes and violations under international law during that period? Specify.
- Is it a crime in the domestic law to deny that the crimes or violations occurred? Specify.
- Has the state introduced legislation to outlaw racial, religious, sex, or any other kind of discrimination? Specify.

³⁵ Note also if the state has issued any reservation, signed a specific bilateral or multilateral treaty restricting its cooperation with the ICC, or has issued a declaration under article 124 of the Rome Statute.



This chapter focuses on the resources and capacities of those state institutions that have a role in responding to the commission of serious crimes and gross human rights violations under international law. These will necessarily vary in each country, but will include the institutions that make up the justice system – those with responsibility to investigate, capture, prosecute, try and sentence perpetrators – as well as those charged with “truth-seeking” registries and archives, vetting and lustration.

The chapter sets out guidelines for gathering the information that will help answer two broad research questions:

- Whether the institutions in question had or have adequate resources (including human resources) and capacities to deal with past crimes and abuses.
- Whether the state has been asked or was obligated to contribute to the needs of these institutions, in what way and how it responded.³⁶

It is important to bear in mind that the purpose of this research is to guide policy in solving institutional problems, not to determine when a state has fully discharged its obligations to respond to mass atrocities. Indeed it is questionable whether such determinations are ever possible and if so who would have the authority to decide³⁷.

This is why in the analytical part of our work, we will use the information gathered in this chapter to analyse resource and capacity levels compared to the objectives set by the body itself or compared to its current or foreseeable workload - not the resource and capacity levels compared to some *ideal* level. The latter presupposes the adoption of a position about what actions by state institutions would be considered sufficient to discharge the state’s legal obligations in the areas of criminal justice, reparations and information disclosure, in response to mass atrocities. For IW to take this position, estimate what resources and capacity would be sufficient and then compare the existing levels to that estimation is beyond the purposes of this research.³⁸

Of course the focus of this research should not be on gathering and analysing information about the resources and capacities of the institution/body *as a whole* but rather on those sections, departments or person(s) within the institutions that deal with past crimes and human rights violations.

It is not expected that the results of this area of research will reflect a clear division between resources and capacity as two distinct categories that cause obstruction or progress. Resources and capacity both in their content and potential effects cannot be fully separated. Resources can include financial, human, and logistical issues that affect an institution’s capacity to do its job. Capacity in turn is not limited to the skills of the personnel and the geographical coverage of the institution but is also linked to the question of *access*: how the service responds to attempts by victims and others to obtain information, justice or reparations. Access will also be covered in the Societal Factors chapter, aimed at gathering information about the experiences of victims, families and others in their attempts to obtain information, criminal justice, information and reparations. Experiences from the ‘customer’ viewpoint about the institution’s response will be used to contextualise the information about resources and capacity gathered in this chapter.

36 In the analytical part of the research, and in the light of information gathered in other chapters, we will also address the reasons for any possible shortfall.

37 Note in this regard that the Rome Statute does not require that, in dealing with the relationship with national proceedings, the ICC makes such determinations.

38 It is generally accepted that in research and measurement of social phenomena, the impossibility of setting ideals of this sort is no bar to researching the issue or to the setting of targets and creation of indicators to monitor progress. We hope that the results of this research will be used by civil society and states as a common base for setting just such targets and indicators. Comment can also be made in the analysis regarding key cases which it is thought the authorities should be prosecuting or which crimes should give rise to reparations or which kind of information should be disclosed.

2.1 THE RIGHT TO KNOW

2.1.1 General

- Obtain or prepare a summarised budget³⁹ for the previous five years of each of the state institutions (or parts thereof) that are charged with or involved in access to information. Express the total of each budget as a percentage of the annual national public budget.⁴⁰
- For contextual purposes, obtain (or cross reference with Chapter 6) the available national demographic information on national literacy rates, educational levels, earnings of the population and tax collection levels.

2.1.2 Non Judicial Commissions of Inquiry (NJCI)

Research question:

*Were the resources and capacities of the commission adequate for the fulfilment of its stated objectives?*⁴¹

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce)⁴²:

- Founding documents setting the goals, objectives and expected results of the NJCI
- An organigram of the NJCI, noting changes in its organisational structure that have occurred since its creation
- The internal rules governing its work (including the rules related to security of staff and information)
- A description of the decision-making process within the NJCI relevant to its operations and policies

(b) Budget

Obtain the total budget – projected and real - of the NJCI throughout its existence, disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis.)
 - Activities (e.g. commission sessions, drafting, field research, office materials etc. The organigram may be used as a basis.)
 - Regional⁴³ offices (if applicable)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)

39 Summary budget here means the total allocation of resources whether decided through executive, legislative or other decision. It should include any supplements or reductions made during the corresponding fiscal year.

40 In each case, a timeline for the past five years should accompany the available budget information so as to enable an overview of changes in funding levels and internal distribution over time.

41 Use of official statistics and interviews/consultation with officials on this question is suggested.

42 Organigrams may be constructed on the basis of interviews with staff.

43 Outside the capital city, or, if based in another location, outside the HQ.

(c) Material resources

From the available information prepare the most complete inventory possible of the key material resources available to the NJCI including:

- Working space
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)
- Copy machines
- Office material
- Travel and vehicles

If regional offices exist, the same inventory should be made for all of them

(d) Staff

Compile the following information, to the extent possible:

- Overall staff numbers, disaggregated by:
 - department
 - function
 - education level
 - nationality⁴⁴ (if possible with functions of non-nationals)
 - regional offices and HQ
- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level (grade)⁴⁵
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality. Note also the average national salary.
- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation and promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attending by staff (over last 5 years or since the establishment of the body if less than 5 years ago), showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

(e) Geographic (territorial) representation

- Map the existence of regional⁴⁶ offices of the NJCI in the country, if any.⁴⁷

Throughout this chapter analysis should include proximity of regional offices/services to places where the crimes were committed or to where the victims currently reside.

44 Throughout the document, term "nationality" is used as the equivalent of "citizenship" – e.g. it does not refer to employees' ethnic or racial origin. Disaggregating staff by nationality is especially important when researching hybrid bodies (non-judicial commissions, courts/chambers or forensic bodies), where a substantial number of employees are non-citizens and may enjoy various privileges in comparison to the institution's national staff (higher salaries, diplomatic immunity, etc.)

45 The requirements should be found in the Person and Job Specifications used in the recruitment processes. Level=grade

46 Outside the capital city, or, if based in another location, outside the HQ.

47 Apart from the existence of regional offices, visits by the commission should be noted with their length and purpose given where possible.

(f) Measurable outputs⁴⁸

- Identify and compile information on potentially measurable results of the NJCI's work, taking into account the institution's responsibilities under its mandate. Include the basic outputs such as: number of cases handled, number of victims and other persons interviewed, number of requests processed etc. Attach separately any internal definitions it had of its envisaged/desired outputs.
- Note the availability and nature of information including statistics generated by the body itself.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the commission and their adequacy for the task it has been charged with. Based on the organigram of the NJCI and other relevant information on its internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is/Was the organisational structure adequate for the fulfilment of the stated objectives of the NJCI?
- Is/Was the budget sufficient to ensure its proper functioning?
- Are/Were the material resources put at its disposal adequate for the fulfilment of its stated objectives?
- Is/Was it adequately staffed for its purpose - in terms of numbers of staff members?
- Are/Were there differences between the staff skills required and those actually available?
- Is/Was the skills or education level of its staff sufficient for the NJCI to function properly?
- Is/Was there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?
- Did the NJCI have adequate geographical coverage?
- Was the NJCI sufficiently accessible for victims/families/general public?

2.1.3 Forensic Investigations

Research question:

Were/Are the resources and capacities of the forensic investigators adequate for the fulfilment of their official duties related to the investigation of serious crimes against international law?

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce) an overview of the ongoing forensic initiatives, bodies, state or non-state, and for each of them note:

- The internal rules governing their work (including the rules related to security of staff and information)
- An organigram and description of the decision-making process
- The number⁴⁹ of exhumation sites excavated (and, if the information exists, numbers and types of other relevant forensic analyses carried out at fatal and non fatal crime scenes) since the end of hostilities or removal of the authoritarian regime. If possible these figures should be broken down per year and should be accompanied by a note of the estimated number of un-examined crime scenes still remaining.
- If a regulatory or oversight body and/or professional body for forensic institutions exists, attach a description of its mandate

48 The purpose of this section is to suggest outputs which could be later monitored by local civil society groups to gauge progress or lack thereof. Researchers must also note whether the institution itself sets targets and if/how they estimate their budget, staff and other resource levels for future year.

49 Use best estimates where no exact figures exist.

(b) Budget

Obtain the total budget – projected and real - of all the forensic bodies charged with exhumations or analysis related to fatal and non fatal crime scenes in the country, disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis.)
 - Activities (e.g. travel, field research, exhumations, outreach etc. – using the organigram as the basis)
 - Regional offices (if applicable)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)
- If possible, obtain an estimated average cost of an exhumation and describe the division of cost.

(c) Material resources

From the available information, prepare the most complete inventory possible of the key material resources available to the forensic bodies including:

- Specialised resources – for example laboratories, DNA testing equipment etc.⁵⁰
- Working space
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)
- Travel and vehicles

If regional offices exist, the same inventory should be made for all of them

(d) Staff

Compile the following information, to the extent possible.

- Overall staff numbers, disaggregated by
 - department
 - function
 - education level
 - nationality (if possible with functions of non-nationals)
 - regional offices and HQ
- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level⁵¹
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality. Note also the average national salary.
- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation and promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attended by staff over last 5 years or since the establishment of the body if less than 5 years ago, showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

⁵⁰ These should be defined by researchers in consultation with representatives of the forensic bodies themselves.

⁵¹ The requirements should be found in the Person and Job Specifications used in the recruitment processes.

(e) Geographic (territorial) representation

- Map the existence of regional⁵² forensic offices or services in the country.

(f) Potentially measurable outputs

- Identify the most important measurable outputs of the forensic bodies' work, taking into account their mandate.
- Note also the bodies' own internal definitions of their envisaged/desired output if any.
- Note the availability and nature of information including statistics generated by the body itself.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the forensic bodies and their adequacy for the task they have been charged with. Based on the organigram and other relevant information on its internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is/Was the organisational structure adequate for the fulfilment of the body's stated objectives?
- Is/Was the budget sufficient to ensure its proper functioning?
- Are/Were the material resources put at its disposal adequate for the fulfilment of its stated objectives?
- Is/Was the body adequately staffed for its purpose - in terms of numbers of staff members?
- Are/Were there differences between the staff skills required and those actually available?
- Is/Was the skills or education level of its staff sufficient for the body to function properly?
- Is/Was there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?
- Did the body have adequate geographical coverage?
- Was the body sufficiently accessible for victims/families?

2.1.4 Archives (including "registries")⁵³

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce):

- An inventory of all the existing registries or archives where information on victims or the persons or bodies alleged to be responsible for SCUIL may be kept. Note in each case the sources of information about the existence of the archive (acknowledgement of the existence by the state/testimonies in court/media reports) and the status of the archive or registry (e.g. existing/destroyed/public/partially closed/closed/unknown)
- The internal rules governing the work of the archive or registry, including the rules related to security of staff and information (cross reference with the chapter on normative framework)
- An organigram and description of the decision-making process within the archives/registries

52 Outside the capital city, or, if based in another location, outside the HQ.

53 Examples would be archives or registries logging victim identification details and crime types, registers of names and locations of displaced people and where they are from, registers of children with lost/disappeared parents and vice versa, and general institutional archives (state and non state) potentially holding information of importance for establishing the circumstances of and responsibilities for the crimes and violations being studied.

- Note the powers or obligations they have to provide applicants with copies or originals of the documents they are searching for independently of where these documents may physically be kept.
- If a regulatory, oversight or professional body for the registry/archive exists, give a description of its mandate

(b) Budget

Obtain the total budget – projected and real - of all the archives/registries noted in the inventory requested at (a) above. The information should be disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis.)
 - Regional offices (if applicable)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)

(c) Material resources

From the available information prepare the most complete inventory possible of the key material resources available to the archive/registry, including:

- Specific material resources (for example security systems, atmosphere-control systems, fire and flood protection system, etc. Define these with the partners and representatives of the registry or archive).
- Working space
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)

If regional offices exist, the same inventory should be made for all of them.

(d) Staff

Compile the following information, to the extent possible

- Overall staff numbers, disaggregated by
 - department
 - function
 - education level
 - nationality (if possible include functions of non-nationals)
 - regional offices and HQ
- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level⁵⁴
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality. Note also the average national salary.
- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation and promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attending by staff over last 5 years or since the establishment of the body if less than 5 years ago, showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

⁵⁴ Supra note 44.

(e) Geographic (territorial) representation

- Map the existence of regional⁵⁵ archives or registries in the country.
- Note the powers or obligations they have to provide applicants with copies or originals of the documents they are searching for independently of where these documents may physically be kept.
- Are the registries/archives adequately geographically represented (where relevant).

(f) Potentially measurable outputs

- Identify and provide information on potentially measurable outputs of the archive or registry taking into account its mandate and its own definition of envisaged/desired output.
- Note the availability and nature of information including statistics generated by the body itself.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the archives/registries and their adequacy for the task they have been charged with. Based on the organigram and other relevant information on its internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is/Was the organisational structure adequate for the fulfilment of the stated objectives of the archive/registry?
- Is/Was the budget sufficient to ensure its proper functioning?
- Are/Were the material resources put at its disposal adequate for the fulfilment of its stated objectives?
- Is/Was the archive/registry adequately staffed for its purpose - in terms of numbers of staff members?
- Are/Were there differences between the staff skills required and those actually available?
- Is/Was the skills or education level of its staff sufficient for it to function properly?
- Is/Was there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?
- Did the archive/registry have adequate geographical coverage?
- Was the archive sufficiently accessible for victims/families/general public?

2.2 THE RIGHT TO JUSTICE

2.2.1 General Issue

Obtain or prepare a summarised public budget⁵⁶ for the previous five years of the all institutions (or parts thereof) involved in criminal justice processes in relation to SCUIL. Express the total of each budget as a percentage of the annual national public budget for those years.

2.2.2 Police Force

If the police force is involved in the investigation of SCUIL, researchers should also be sure to include consideration of the police authorities in their inquiries under the Independence and Willingness chapter. In addition, and irrespective of their role in investigating SCUIL, the police authorities should be covered in relation to security checks and general vetting under the sections of the instrument dealing with measures to guarantee non recurrence.

55 Supra note 38.

56 Supra note 38.

Research question:

Are the resources and capacities of the police forces (units) involved in the investigations of SCUIL adequate for the fulfilment of their stated objectives?

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce):

- An organigram of the departments/units of the national police force that investigate SCUIL. Include changes in the organisational structure since the end of the hostilities or authoritarian regime. If no dedicated department/unit exists, describe the way in which SCUIL investigations are incorporated into the work of regular police units.⁵⁷
- The internal rules governing these units' work, including the rules related to security of staff and information (and internal regulations or directives that establish specific duties or investigative procedures)
- A description of the relevant⁵⁸ decision-making processes within or outside the unit. In the event that there are no special processes for SCUIL investigations, describe the applicable general decision making process in criminal investigations)
- If a regulatory, oversight body or professional body exists for the units or for police in general, give a brief description of its mandate.

(b) Budget

Obtain the total budget – projected and real - of the police departments or units identified under (a) above disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis)
 - Activities (also using the organigram as the basis)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)

(c) Material resources

From the available information prepare the most complete inventory possible of the key material resources available to the departments/units in charge of IW-type crimes, including:

- Specialised equipment (to be identified together with partner organisations/police representatives)
- Working space
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)
- Copy machines
- Office material
- Travel and vehicles

(d) Staff

Compile the following information, to the extent possible

- Overall staff numbers, disaggregated by
 - department
 - function
 - education level
 - nationality (if possible, include functions of non-nationals)
 - regional offices and HQ

⁵⁷ If no specialised unit exists, researchers may elect to make case studies of the units within which SCUIL are dealt with.

⁵⁸ Decisions that have policy or operational impact on investigations of SCUIL. Examples might include budget approval, allocation of staff, prioritisation and allocation of cases.

- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level⁵⁹
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality. Note also the average national salary.
- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation and promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attending by staff [over last 5 years or since the establishment of the body if less than 5 years ago], showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level, of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

(e) Geographic (territorial) representation

- Map the geographical presence of police authorities dealing with SCUIL.

(f) Potentially measurable outputs

- Identify and provide information on potentially measurable outputs of the police authority taking into account its mandate and its own definition of envisaged/desired output.
- Note the availability and nature of information including statistics that is generated by the body itself.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the police forces investigating SCUIL and their adequacy for the task they have been charged with. Based on the organigram and other relevant information on internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is the organisational structure for investigating SCUIL adequate?
- Is the budget allocated to the police departments or units in charge of investigating SCUIL sufficient to ensure their proper functioning?
- Are the material resources allocated adequate for the proper functioning of the police departments or units in charge of investigating SCUIL?
- Does the relevant police department/unit have enough staff members in every department to be able to function properly?
- Are there differences between the staff skills required and those available?
- Is/Was the skills and education level of the staff sufficient for proper functioning of the department/unit?
- Is there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?

⁵⁹ supra note 44.

2.2.3 Prosecutorial system⁶⁰

Research question:

Are the resources and capacities of the prosecutorial system adequate for the fulfilment of its stated objectives for the prosecution of SCUIL?

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce):

- An organigram of the parts of the prosecutorial system that are involved in investigating⁶¹ and prosecuting SCUIL. Note changes in the organisational structure that have occurred since the end of the hostilities or authoritarian regime.
- The internal rules governing the work of prosecutors, including the rules related to security of staff and information, and the internal regulations or directives that establish specific duties and any procedures on SCUIL).
- Description of the relevant decision-making processes
- Geographical representation of the part of the prosecutorial system involved in investigating and prosecuting SCUIL (concentrated in one specialised institution or spread out as a sub-part of specialised/general regional prosecutorial structures?)
- If a regulatory, oversight or professional for prosecutors exists, give a short description of its mandate.

(b) Budget

Obtain the total budget – projected and real - of the bodies identified above since the end of hostilities or authoritarian regime, disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis.)
 - Activities (also using the organigram as the basis)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)

(c) Material resources

On the basis of available information compile the most complete inventory possible of the key material resources available to the prosecutors of SCUIL, including:

- Working space
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)
- Copy machines
- Office material
- Travel and vehicles

(d) Staff

Compile the following information, to the extent possible

- Overall staff numbers, disaggregated by
 - department
 - function
 - education level
 - nationality
 - regional offices and HQ
- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level⁶²
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality. Note also the average national salary.

60 The organ or organs responsible for the prosecution of crime.

61 In those countries where prosecutors are involved in the investigation of crime. If only police are responsible for investigations, note this in the section on police forces below; if both likewise note the relationship.

62 supra note 44.

- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation and promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attending by staff over last 5 years or since the establishment of the body if less than 5 years ago, showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

(e) Geographic (territorial) representation

- Map the geographical presence of prosecutorial authorities dealing with SCUIL.

(f) Potentially measurable outputs

- Identify and provide information on potentially measurable outputs of the body taking into account its mandate and its own definition of envisaged/desired output.
- Note the availability and nature of information including statistics generated by the body itself
- Provide or compile an inventory of the SCUIL cases prosecuted⁶³ since the end of hostilities or authoritarian regime including
 - charges
 - locations of crimes
 - names and positions of the accused in the police/military/paramilitary/political/non state armed group chain of command
 - numbers of victims of the crimes in question and
 - the final outcome of the prosecution.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the prosecutorial bodies responsible for prosecuting SCUIL and their adequacy for the task they have been charged with. Based on the organigram and other relevant information on its internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is/Was the organisational structure adequate for the fulfilment of the body's stated objectives?
- Is/Was the budget sufficient to ensure its proper functioning?
- Are/Were the material resources put at its disposal adequate for the fulfilment of its stated objectives?
- Is/Was the body adequately staffed for its purpose - in terms of numbers of staff members?
- Are/Were there differences between the staff skills required and those actually available?
- Is/Was the skills or education level of its staff sufficient for the body to function properly?
- Is/Was there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?
- Did the body have adequate geographical coverage?
- Was the body sufficiently accessible for victims/families?

⁶³ 'Prosecuted' in this context means cases which have reached the trial stage. This will be determined according to the applicable national laws of criminal procedure and should include cases where only one or some of a group of co-accused is tried, and cases in which the trial has resulted in acquittal, conviction or was deserted after the beginning of the trial stage. Any existing information or statistics should be noted. If none are available (whether official or unofficial) and the number of prosecutions that have reached trial is so high that this task would be unmanageable for researchers, simply note the location and extent of primary information available on the basis of which an inventory could be based.

2.2.4 Judiciary

Research question:

Are the resources and capacities of the judicial bodies charged with SCUIL cases adequate for the fulfilment of their state objectives?

(a) Organisational structure and the decision-making process

Obtain (or, if unavailable, produce):

- A brief description or organigram of the judicial structures within the national system that deal with SCUIL at investigation, trial or appeal level (whether regular courts, specialised bodies such as courts, panels or chambers).
- If specialised bodies exist to deal with SCUIL, provide a description and organigram of their organisational structure (and any structural relationship to the regular system) noting changes in structure since the end of hostilities or authoritarian regime
- Provide the internal rules governing the work of any judicial structures identified above noting those that establish specific duties or procedures for judges
- A short description of the decision-making processes within these judicial structures
- If a regulatory, oversight or professional body exists for these bodies or judges and their staff in general, provide a description of its mandate.

(b) Budget

Obtain the total budget – projected and real - of the judicial bodies identified under (a) above⁶⁴ since the end of hostilities or authoritarian regime, disaggregated by:

- Year
- Each year by:
 - Functional departments/spending lines (i.e. how the body divides its own spending internally. The organigram may be used as a basis.)
 - Activities (also using the organigram as the basis)
 - Sources of financing (e.g. state, foreign governmental, foreign intergovernmental, foreign non-governmental, private)

(c) Material resources

On the basis of the available information compile the most complete inventory possible of the key material resources available to the judicial structures identified at (a), including:

- Working space & specialised court equipment (recording, evidence management systems, etc)⁶⁵
- ICT resources (computers, specialised software, internet accessibility, scanners)
- Communication resources (telephones, faxes etc.)
- Copy machines
- Office material
- Travel and vehicles

(d) Staff⁶⁶

Compile the following information, to the extent possible

- Overall staff numbers, disaggregated by
 - department
 - function
 - education level
 - nationality (if possible include functions of non-nationals)
 - regional offices and HQ

⁶⁴ Where the ordinary courts also deal with SCUIL cases, researchers should obtain the relevant budget information and ensure a suitable range of additional sources on the basis of which the adequacy of the application of resources to SCUIL cases can be analysed. Examples of this information would include both internally and externally generated information and perceptions, and consultation with a public expenditure expert.

⁶⁵ As with all bodies above, the resources considered key should be identified in consultation with members of the body itself.

⁶⁶ This should include not only judges but court staff, such as clerks, administrators, interpreters, IT and other relevant support staff.

- Entry level requirements for qualifications, skills and experience of staff, disaggregated by function and level⁶⁷
- Actual qualifications of a random sample of staff disaggregated by function and level
- Salary scales of staff disaggregated by department, function, level and nationality Note also the average national salary.
- Do internal policies/practices exist in relation to the following matters?
 - Recruitment
 - Staff evaluation or promotion
 - Staff workload
 - In each case obtain a copy if available and note whether the body has an internal or external oversight process to ensure compliance with the policy/practice
- Note training attending by staff over last 5 years or since the establishment of the body if less than 5 years ago, showing in each case
 - topic
 - training provider
 - the state's role or commitment
 - department, function, level of participants
- Have there been any assessments carried out of the effectiveness of this training (whether by those providing it or a third party)? If so attach.

(e) Geographic (territorial) representation

- Map the geographical presence of judicial bodies dealing with SCUIL.

(f) Potentially measurable outputs

Adding to the information on potentially measurable outputs of the prosecution service (see 2.2.3 above) note the availability and nature of information generated by the judicial bodies dealing with SCUIL about the process of cases through the judicial system. (For example available official statistics or existing studies on the average length of a criminal process.) Again, supplementing the information obtained under 2.2.3 make an inventory of judicial activity related to the prosecution of SCUIL including pre trial preliminary objections and other appeals, post trial appeals and judicial review, and all constitutional appeals.⁶⁸

If there have been judicial proceedings relating to freedom of information regarding SCUIL or reparations to victims of SCUIL, corresponding information should be obtained.

Staff perceptions (on points (a) to (f) above)

This part of the research should focus on the staff's views of the resources and capacities of the judicial bodies responsible for processing cases of SCUIL and their adequacy for the task they have been charged with. Based on the organigram and other relevant information on its internal structure, the researchers should identify the employees to be consulted.

Compile staff views on the following issues:

- Is/Was the organisational structure adequate for the fulfilment of the body's stated objectives?
- Is/Was the budget sufficient to ensure its proper functioning?
- Are/Were the material resources put at its disposal adequate for the fulfilment of its stated objectives?
- Is/Was the body adequately staffed for its purpose - in terms of numbers of staff members?
- Are/Were there differences between the staff skills required and those actually available?
- Is/Was the skills or education level of its staff sufficient for the body to function properly?
- Is/Was there enough training available to assist in raising the level of staff skills if necessary?
- Do staff and management consider that the training was effective?
- Did the body have adequate geographical coverage?
- Was the body sufficiently accessible for victims/families?

⁶⁷ supra note 44.

⁶⁸ The information should be as clear and brief as possible. Any comment and analysis of the substance or circumstances of the proceedings should be restricted to specific case studies.

2.3 RESOURCES AND CAPACITY – REPARATIONS

Research question:

Are the resources and capacities of the institutions dealing with reparations adequate for the fulfilment of the task of assessing and administering claims for reparations from victims?

The aim of this section of the research is not to assess the adequacy of the reparations programmes as a whole or the awards they make, but to identify whether the resources and capacities of the bodies or institutions that are in charge of dealing with reparations claims help or hinder their work and in which specific ways.

The precise format and extent of data gathering and the specific research questions on resources and capacities of each of institutions involved in reparations processes shall be designed by the in-country researcher(s).

If there is no specialised institution or body dealing with reparations and victims must seek compensation through the civil courts, an ombudsman body or general criminal injuries compensation scheme for example, the questions should of course be applied to that body (or the part of it which deals with reparations claims from victims of SCUIL).

The information to be collected about these institutions or bodies mirrors that listed above in relation to Non Judicial Commissions of Inquiry, archives, prosecution bodies, police authorities and judicial bodies. It should include information on:

- organisational structure and decision-making
 - budget
 - material resources
 - staffing (including training)
 - territorial representation
 - measurable outputs
-

2.4 RESOURCES AND CAPACITIES – MEASURES TO PROMOTE NON RECURRENCE

As already noted in the introductory part of this instrument, as far as the issue of non-recurrence is concerned, IW has decided to focus a limited inquiry on three issues: (i) vetting (ii) lustration and (iii) the disbandment of armed units implicated in SCUIL, the reintegration of fighters into society and the demobilisation of child soldiers.

If major programmes of vetting, lustration or disbandment have been initiated, answer the following questions in addition to questions answered under 1.5:

- Did a process of public/interest group⁶⁹ consultation occur before the creation of the measure?
- Did that process include participation of a wide range of civil society actors and victims?
- Does the reform measure include targets and timescales?
- Does/Did the state budget for the relevant period include allocation to the institutions in question to carry out the measures?
- Has the measure been carried out within the timescale set? Partially/completely?

⁶⁹ For example with institutional representatives, victims, experts and civil society.

If major programmes of vetting, lustration or disbandment and reintegration have been initiated, researchers should apply an adapted version of the Resources and Capacity section to the units or bodies responsible for administering or ensuring implementation of the programme, covering:

- organisational structure and decision-making
- budget
- material resources
- staffing
- territorial representation
- measurable outputs

2.5 RESOURCES AND CAPACITY: OTHER RELEVANT BODIES

Institutions other than those already mentioned above may play a role in the transitional justice processes.

These bodies may be judicial, legislative or executive. Examples would include:

- A Constitutional Court Tribunal
- An Ombudsman's Office
- A legislative human rights commission
- A national human rights institution⁷⁰

Note briefly the function of other relevant bodies for TJRNR issues.

Gather information on these other relevant bodies covering the same areas referred to above:

- organisational structure and decision-making
- budget
- material resources
- staffing
- territorial representation
- measurable outputs

Since it may be inappropriate to apply the entire set of questions to these kinds of bodies, for example if they have only a limited or subsidiary role, the format and extent of information gathering can be decided upon by researchers.

⁷⁰ Such NHRIs, as they are often referred to, frequently operate within the executive. Others are autonomous or attached to specific departments of state or ministries.

Comments to researchers

When gathering information required under this chapter, researchers will have to rely on two main categories of sources:

- **official documents produced by institutions (statistics, budgets, internal rules and policy documents etc.) and**
- **information provided through interviews with employees of those institutions and various outside experts.**

The two categories of findings should be used to clarify and contextualise one another.

The following is an overview of the main issues to bear in mind when gathering and interpreting data coming from these sources.

Budgets

The adequacy of institutional budgets and the adequacy of state contributions to those budgets⁷¹ are key issues for IW. Clearly a position will have to be reached about what level and types of resources would be in the range required to carry out the work assigned (or planned to be assigned) to a specific body, whether a prosecution team, non judicial commission of inquiry or reparations programme. In terms of information that will assist in making those estimates, in addition to opinions⁷² on adequacy (whether from employees, directors, users, observers or donors) comparisons may be carried out of *actual resource levels* against a variety of readily quantifiable figures and professional estimates.

Depending on the circumstances of the country where the research is being conducted, a combination of the following methods of comparison can be used:

- comparison of the budget of the section dealing with past crimes and abuses with the global budget of the Department or Ministry it belongs to;
- comparison of the resources requested with the resources granted;
- comparisons with other national or international bodies dealing with common crime (preferably complex and organised crime);
- comparison with practices in similar institutions in other countries.

Tracking the increase or decrease of state (and international) investment over time is also recommended, as is tracking of any increases in funding and what they were actually spent on within the institutions in question.

In all cases of both quantitative and qualitative information on financial investment, there are likely to be many variables and factors capable of affecting the figures. There will also be many reasons and combinations thereof that can explain state or institutional funding priorities and changes in commitment over time and so care should be taken with interpreting the cause of increases and decreases.⁷³

Personnel capacities

This part of the research is not limited to training but would also include the recruitment, evaluation and promotion of staff.

Presumptions: By necessity, the choice of information to be collected and analysed is based on certain presumptions: (i) recruitment based on a regulated, transparent procedure involving open competition will generally lead to a higher level of staff skills and experience, (ii) staff training on relevant skills is in general a positive development and together with regular evaluation of skills can improve institutional capacity, (iii) certain skills can be identified as necessary for specific institutions engaged in dealing with past crimes and abuses. As well as seeking a wide range of views, IW itself is in a position to provide a coherent assessment on what those skills are. (iv) People working in institutions that are engaged in transitional justice processes and who have both adequate capacities in relation to their jobs and adequate resources at their disposal will increase their performance and therefore that of the process as a whole.⁷⁴

Information availability: While recruitment processes might be internally transparent, at least at managerial level, they may not be open to public scrutiny except for very high level appointments where all the candidates' identities are usually

71 Within the overall framework noted above, that is in comparison to the institution's current or planned workload not in comparison to an envisaged ideal workload.

72 The use of qualitative research methods such as perception studies, focus groups and in-depth interviews is recommended.

73 A reduced financial commitment from parliament to an institution could reflect reduced commitment in general to accountability, but could equally be due to the efficiency of that institution in working through its caseload the previous year, or due to circumstances requiring re-allocation of funds to or from certain departments.

74 While proving or disproving these statements is not therefore the subject of inquiry here, the research does aim to show whether and to what extent skill levels constitute an obstacle to accountability. Since in many cases the relevant institutions may have already received training, the research results can help to focus future training and emphasise the need for rigorous impact assessments of such training.

publicly known. Information may therefore be difficult for researchers to obtain and so it is advisable that they find out if recruitment policies exist, whether the policies are available and whether there is an internal or external watchdog system in place designed to ensure compliance with them.

Evaluation of staff: Given the likelihood that internal appraisal information is confidential, once again inquiry into policies and oversight is advisable. Information regarding the creation and maintenance of professional entry procedures and continuing upkeep of standards across institutions or professions is also relevant. That said, in some professional fields (police, lawyers, judges for example) regular evaluation of technical skills may be rare, or socially and culturally difficult to propose or implement.

Use of Qualitative Research Methods: In order to get the best possible understanding of the adequacy of resources and capacities it is recommended to study the views and assessments of the employees of the institutions in question. A broad range of qualitative research methods is available for this kind of study including in-depth interviews, focus groups and more extensive perception studies. The choice of the most suitable method will be made on case-by-case basis, but should cover different relevant posts and levels of seniority and should seek to identify what skills people think they/their colleagues/superiors and subordinates have or lack, and how they think that situation directly helps or obstructs the process of providing information, justice, reparations or reform. Clearly the subjectivity of these views is compounded by the variable of how much knowledge each interviewee has about the skills they, their colleagues or leaders *should* have in order to carry out specific work. Therefore employee perception studies need to be supplemented with other sources. Finally, views sought should include the potential for confidential feedback on the use or misuse of recruitment processes and adherence to internal recruitment and promotion policies to allow comparison with the official data.

Entry level qualifications, skills and experience levels constitute useful information. In relation to the question on entry levels, researchers should inquire whether Person and Job Specifications are used in recruitment for the key institutions. Since there will be a very wide variation of educational and professional skills and training levels in different countries, it will probably only be possible to comment meaningfully on the adequacy of Person Specifications if they grossly mismatch what is known about the job. In addition, and depending on feasibility, data obtained from a suitably defined sample of recently recruited staff might also be compared with the person/job specifications, to give some idea of whether these specifications are being adhered to in practice.

Staff numbers and workload

Of particular importance is the mapping information: the organigram, the hierarchy, identification of which sections or persons deal with processes of information disclosure, criminal justice, reparations or non-recurrence initiatives. General information relevant to this area of inquiry would include whether policies or regulations exist regarding the size and type of caseload that workers within those processes can have (prosecutors, police, judges, NHRI officials, reparations program officials and so on.) Ideally, information should be sought on the average caseload. In addition to seeking the perceptions of relevant actors, there is some scope for quantitative comparison of caseloads though always with the caveat that “case” can mean many different things depending whether cases are defined and counted by accused, by victim, by crime type, perpetrator, crime scene etc. Crucially, it should always be noted whether there are any internal practices or guidelines on workload and whether there is at least any system in place to monitor both the workload of employees and the progress of cases through the system in question.

Equipment and geographical coverage

For equipment, a combination may be used of views of staff, information from the equipment lines of institutional budgets and, in the case of smaller units and sections within institutions, complete inventories. On the topic of geographical coverage, much will depend on the areas of crime concentration and current whereabouts of victims, particularly if many of them are internally displaced or refugees. Researchers should try to obtain information about the geographical spread of the reported crimes and abuses as well as information on the number of offices (temporary or permanent) of the relevant bodies, the number of staff in those offices, and field visits by the relevant bodies, etc. Temporary bodies like reparations programmes and non judicial commissions of inquiry are likely to be centrally administrated but may have public access points around the country. Recording any gap-filling by NGOs and other non-state bodies is of particular importance, for example civil society efforts assist victims to travel and participate in all kinds of transitional justice processes.

In relation to all aspects of this chapter researchers are encouraged to assess whether further information might be needed in order to interpret the information about resource and capacity levels and where it could be sourced.



The independence and willingness referred to in this chapter is that of the institutions of the state bureaucracy that are responsible for providing information and administering criminal justice, reparations and non recurrence measures in relation to past crimes and human rights violations. The institutions examined should therefore include all those identified in the previous chapter, as well as any special commissions or mechanisms charged with “truth-seeking”, preserving archives, applying administrative or disciplinary sanctions, vetting, lustration or disbandment.

The objective is to identify the role of independence and willingness in the two primary areas on which this research focuses - obstructions to particular transitional justice processes, and state compliance with legal obligations on accountability.⁷⁵ Independence and willingness can however also have an impact on (and be affected by) issues that are outside the state’s control but which are no less vital for a full understanding of the causes of impunity. These issues would include for example the willingness of victims and witnesses to engage with the institutions and the ease with which special interest groups can influence transitional justice processes and their outcomes. For this reason, it is of particular importance to contextualise the results of this chapter with those of the Societal Factors and Entrenched Interests chapters, below.

Independence

It is necessary to set out how the institutions work before embarking on any comparison with the major basic requirements of independence - which have been drawn from international guidelines. Thereafter the inquiry should look at what if anything can be concluded about the relationship between independence and responding to past crimes and human rights abuses. Is more information required? While a general lack of independence of an institution or the appearance thereof is unsatisfactory and will be duly noted, it should not be inferred automatically that transitional justice processes are in fact being obstructed. Some of the questions below on independence are clearly focused on examining examples of *actual obstruction* of information disclosure, investigation, prosecution, reparations or reform. Clearly this will be very challenging and it may be difficult for researchers to obtain sufficient reliable information on more than a small number of such cases. It is therefore vital that case studies are the result of proper sampling, that they are sufficiently contextualised, that there is no bias in source identification and that conclusions made on the basis of case studies are substantiated.

Final points:

- Impartiality is also included in this chapter since it is inextricably linked to independence.
- The possible causal link between a lack of independence and unwillingness/impartiality should be appreciated.⁷⁶
- One useful secondary goal of this part of the inquiry would be to determine if possible whether, in a system where the institutions are generally independent and willing to do carry out the work assigned, they act differently when it comes to the crimes and violation types under examination.

⁷⁵ The orientation for the questions set in this chapter was the field of study of *legal* and in particular *judicial* bodies. Nonetheless, since the same concepts and criteria have relevance for many other bodies responding to mass atrocities, the overall framework of the inquiry into independence and willingness will be applied as much as possible to the full range of institutions involved.

⁷⁶ For example if the judiciary is subject to executive control – that is to say there is a lack of formal *independence* – this may result in the appearance of *partiality* if not actual instances thereof. Judges may for this very reason be unwilling to make progress in certain cases or make certain rulings for fear of being dismissed, losing promotion prospects and so on.

Willingness

The instrument follows in part the approach of the Rome Statute on the topic of willingness and so covers the issues of shielding of the accused and unjustified delays.⁷⁷ Clearly it would be extremely difficult to isolate willingness as a variable among the many sources of obstruction of transitional justice processes, and it is not therefore obligatory that researchers endeavour to do this. The objective is rather to identify whether it is *a factor*, given that the aim of the research is to attempt to uncover as precisely as possible the *reasons* behind the unwillingness so as to inform policy responses. As in the case of independence, uncovering those reasons might only be feasible by way of case studies.

As part of the research on the obstacles to criminal accountability or other responses to mass atrocities, factors demonstrative of INABILITY to prosecute, as noted in Rome Statute article 17.3, are real possibilities in certain situations: the state cannot act because the legal system has totally or partially collapsed, or because it cannot obtain custody of the accused, or obtain the evidence/testimony required. Similar situations of inability might occur in relation to efforts to find and disclose information, to make reparations or to carry out vetting, lustration or disbandment processes. So while inability is not addressed as a separate issue in the instrument, the information gathered on Normative Framework and Resources and Capacity should yield data capable of identifying situations that fall into this article 17(3)-type category. Also of interest in relation to inability are reasons other than the unavailability or collapse of the national judicial system why a state cannot obtain evidence or the custody of the accused.⁷⁸

It is vital to allow the institutions in question an adequate opportunity to explain and respond to any general or specific allegations of lack of independence or impartiality, shielding or delay covered by the research.

The overall research question in relation to independence and willingness is whether and in what specific ways these issues obstruct or facilitate transitional justice processes.

3.1 GENERAL PART: INDEPENDENCE

3.1.1 Independence: mapping⁷⁹

Obtain a copy of the laws or other documentation demonstrating or regulating the undernoted issues (i) – (xii)⁸⁰ in relation to *all* bodies or institutions which have responsibilities related to investigation or prosecution of the crimes and violations being studied, the disclosure of information relating to them, the provision of reparations, (e.g. non judicial commissions of inquiry, prosecution authorities, police, judiciary, archive authorities, reparations bodies) and the implementation of measures designed to ensure non recurrence.

- (i) The manner in which the body was created and by whom
- (ii) The hierarchy within the body and the hierarchy, if any, it has within the state structure generally
- (iii) Its functions and powers
- (iv) The taking of decisions, and appeals and reviews of those decisions
- (v) The source of its funding
- (vi) The criteria and procedures by which its members are appointed/elected/appraised/promoted/removed

77 The Rome Statute sets out three indicators of unwillingness in article 17(2): firstly proceedings shielding a person from criminal responsibility, secondly unjustified delay and thirdly lack of independence or impartiality or otherwise conducting a process in a manner that is inconsistent with an intent to bring the person to justice. In this instrument, independence and impartiality are, where possible, researched separately from willingness.

78 Examples may include the effects of a deficient witness protection programme, lack of outreach to potential witnesses, limits of external cooperation relationships the state has with other states whose assistance is required to effect arrest warrants or locate witnesses. Note should be taken of matters which are not wholly within the state's control but over which it nonetheless exerts influence.

79 The questions in this section are based on the guidelines relating to impartiality and independence contained in: the Joint Principles (6, 7a, 8, 10a, 15, 17, 32), the updated Joint-Orentlicher Principles (7, 8, 11a, 16, 18, 19, 30), the jurisprudence of the European and American Courts of Human Rights, the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65 and finally the UN Basic Principles on Independence of Judiciary. Other reference material consulted included the IFES Model *State of the Judiciary Report* November 24th 2006 and General Comment no. 13 on the ICCPR, as well as the OSI AFRIMAP studies.

80 Some or all of these issues may be clarified within the chapter on Normative Framework.

- (vii) The terms of employment and payment of its members and staff, including any protections and immunities that they enjoy
- (viii) The criteria and procedure for distribution of tasks or cases between members/staff
- (ix) Internal disciplinary rules for failure to abide by its regulations
- (x) Existence of legislated or otherwise regulated sanctions (including criminal) for interference in the work of the body or any of its members or staff
- (xi) The powers and roles of any other state bodies (particularly the political organs) in respect of any of the above issues. This should include any control by executive, legislature, or head of state over the lifting of any form of immunity⁸¹ of state officials prior to prosecution or civil suit for damages
- (xii) The composition of the body's members and staff + comparable statistics of relevant societal sectors in the country in question⁸²

The information gathered should be sufficient to allow the researcher to answer the following questions relating to the basic requirements of an independent/impartial body:

3.1.2 Independence: basics

- (i) Is the body institutionally independent from both the political organs of state and from all other institutions that are alleged to have participated in the crimes and violations under examination?
- (ii) Is the independence of the institution guaranteed *de jure* in the constitution or in its own founding documents?
- (iii) Can the decisions taken by the body be reviewed, amended or invalidated by any political organs of state or by any institution (or member thereof) alleged to have participated in the crimes/violations?
- (iv) Do the political organs of state or any of the institutions alleged to have participated in the crimes/violations have a role in the creation, funding, mandate, staffing, employment terms⁸³ of the body or its members?
- (v) Is the term of office of senior members of the body fixed by law?
- (vi) Are members and employees protected from prosecution and civil suit (including defamation) for acts or omissions carried out in the ordinary course of their duties for the body?
- (vii) Is the removal or suspension of its members and employees subject to fixed criteria and does it follow a legally mandated procedure? Does the member have the right of appeal to a separate authority that is not hierarchically or functionally related to the body?
- (viii) Is information about the level and sources of the body's funding publicly available?
- (ix) Does the body have representation of women and other vulnerable groups broadly proportional to society in general?

3.2 GENERAL PART: WILLINGNESS

3.2.1 Shielding

Document⁸⁴ alleged instances in which formal or informal mechanisms, practices or *ad hoc* actions on the part of state bodies have prevented persons from being subject to investigation, prosecution, vetting, or lustration or have prevented information disclosure or the making of reparations *by such persons*. Generally or more widely applicable shielding mechanisms are also relevant here subject to cross reference with other chapters of the instrument as necessary.⁸⁵

81 For example functional immunity (protecting persons for acts committed as part of their official function), and personal immunity (protecting a person for so long as they hold a particular office.)

82 For example women, minorities, racial, religious, ethnic, political, social, economic and other groups, as relevant.

83 including removal/suspension

84 A brief note is sufficient providing reference to all sources is given.

85 Amnesty laws would clearly indicate attempts to shield and are already covered by the Normative Framework chapter. Their application *in practice to specific persons or groups* – for example they may be a component of demobilisation processes – should however be noted in this chapter.

3.2.2 Delays

In relation to all the relevant institutions, compile the available information regarding timescales, inputs and outputs and log the reasons, if any, given for any specific delays.

Unjustified delays (where the state had been given an adequate opportunity to respond) may include:

- Delays that have been explained but where responsibility was placed on a different section of the same state body or another state body altogether.
- Delays explained as being due to external factors but where insufficient or no attempt has been made by the state to mitigate those factors.

Cross referencing with resources, capacities and normative framework is required, as possible factors influencing timescales.

If the institutions themselves do not generate suitable data, case studies may be used. Attention should not only focus on whether the delay is unjustified but on documenting the state's actions in response to a situation, since part of the inquiry relates to identifying actions that can be classified as inconsistent with an intention to bring the person to justice (or to disclose information, or to make reparations). Due note should be taken to distinguish factors that are within or partly or wholly outside the state's control.

3.3 SPECIFIC PART

Again, and of particular importance in the case of specific allegations, it is vital to allow the institutions in question an adequate opportunity to explain and respond to any allegation of lack of independence or impartiality, shielding or delay covered by this research. Ample discussion is recommended during the in-country adjustment phase as to suitable case studies and sources given the risk of bias, incompleteness, exaggeration and inaccuracy. Primary sources and legal findings are preferable to newspaper reports⁸⁶ and other hearsay. Reference should be made to the IW guidance on source evaluation.

3.3.1 The right to know

3.3.1.1 Non judicial commissions of enquiry ("NJCI")⁸⁷

Compile the available information relating to alleged incidents of the kind listed below in relation to processes involving investigation and disclosure of information relating to the crimes and violations under examination noting carefully in each case the sources of allegations.

Independence

- Bias, for example in the determination of procedures, case selection, access to victims, and conclusions of its final report
- Political control through commissioners, staff, or due to regulations and political pressure
- External interference, including by Government, political parties, economic actors, armed groups, etc.
- Manipulation of decisions
- Attacks and threats on members of the staff or their families, or on those who assist its work (including those who assist it by providing information)
- Corruption, including mismanagement of resources, elevated salaries, nepotism, and unjustified allocations

⁸⁶ Excepting of course undisputed quotes from the relevant individuals.

⁸⁷ Both concepts – independence and impartiality - are joined for this section since it relates to actual examples of alleged lack of independence and willingness and it not the purpose of this study to separate them as causes of specific outcomes.

- Inaction or delays, including unjustified delays in the body's establishment and operations; such delays between end of information gathering and publication of the report; such delays between end of activities and the opening for public access of the non-confidential data gathered by a NJCI.
- Pressure on the NJCI from international or other external actors such as foreign governments and restrictions imposed by the international community to grant the NJCI access to relevant information. (This must be contextualised and balanced by consideration of the legitimate reasons states and international organisations including humanitarian groups may have for not revealing intelligence.)

For willingness, note also:

- Any action not listed in the general part above, but which is alleged to be inconsistent with an intention to discover and publicise information about the crimes and violations in question

For shielding, note also:

- Whether there was any difference between the efforts made by the NJCI to encourage and obtain information from the different parties to conflict, sectors of society and from victims
- Whether all those who could provide information were subject to the same the rules on confidentiality

3.3.1.2 Forensic bodies

Compile the available information relating to alleged incidents of the kind listed below in forensic processes of all kinds relating to the crimes and violations under examination noting carefully in each case the sources of allegations.

- Lack of protocols, procedures (including identification procedures) or lack of supervision or adherence to them.
- Lack of transparent criteria for decisions on where and when to investigate or instances of a biased selective approach having been taken to the crimes under its authority
- Influence or control over the forensic investigative body, through the head of the relevant institution, or by other actors.
- External interference in the forensic procedures that could impede objective and impartial investigation, including control over the results of research by judges and prosecutors or others (whether within or beyond their legal powers.)
- Failures by the authorities to provide security for the crime scene (before and during its examination by forensic experts.)
- Manipulation of the crime scene (including those in which mass graves are located) or loss of stored information. Include here any information regarding incidents of destruction or removal of evidence including human remains.
- Attacks and threats to forensic experts, their staff or families or persons who assist their work
- Challenges to the authority of the forensic service, including incidences where there has been an alleged lack of capacity to reach scientific conclusions, or to defend those conclusions in formal proceedings (e.g. criminal trials, civil suits, cases before human rights bodies)
- Any other potentially biased influence of external (including international) actors in the forensic procedures

Willingness

Obtain the *available* data on:

- The number of reported crime scenes and number of forensic investigations carried out over a relevant period to be defined
- The response rate of the state and non state forensic bodies and prosecution service to requests by families for forensic analysis (including exhumations)⁸⁸
- The average time taken between requests by families for exhumations and initial responses by both state and non state forensic bodies⁸⁹
- Average time taken between a request for the forensic procedure and its commencement⁹⁰
- Any incidence of deliberate or negligent loss or damage to samples or to the crime scene itself such as would contaminate evidence
- Any incidence of different levels of crime scene protection being applied
- Any incidence of differing responses to alleged crimes depending on alleged perpetrator/type of crime

88 This must be subsequently cross referenced as necessary with the obligations of the forensic body/prosecution service in the normative framework section.

89 Unless there are statistics kept this would have to be gauged by some kind of sample of families' experiences/NGO views. In either case, the focus should be on time taken to respond, and cases where there was no response at all.

90 Ibid.

3.3.1.3 Archives (including registries)

Independence

Compile the available information relating to alleged incidents of the kind listed below in relation to creating, maintaining and administering access to relevant archives and registries noting carefully in each case the sources of allegations.

- Lack of transparent criteria for the incorporation of information into an archive or registry, exclusion of information from it, or the amendment or disclosure of information
- Political control or influence impeding the functioning of the archive or registry
- Any external interference in the archive/registry by political or other state authorities or by the head of the Registry, beyond his or her legal attributions
- Manipulation of the archive/registry, altering the information originally provided
- Attacks and threats on the personnel of the archive/registry or their families or persons who assist its work (including by providing information to it)
- Corruption by staff or co-optation of the archive/registry
- Lack of cooperation of local and international actors with requests for information coming from the archive/registry officials

Collect the following additional information on issues specifically related to independence and impartiality within archives and registries⁹¹:

- Note the “universe” of alleged/reported crimes and human rights abuses, in order to compare the nature and scope of information actually available to victims and families. For example, an estimate of the total number of disappeared persons can contextualise the available information on arrests and detentions during the relevant period.⁹²
- Must public officials or bodies publicly declare or advise other state organs of the subject matter of the requests they have refused and granted? (This relates to requests for information other than personal information under *habeas data*).

Willingness

- Re shielding: Do different rules apply depending on the type of information sought by an individual from the archive/registry? (Examples include different fees, time limits for application/delivery, rules for receiving reasons for refusal.)
- Re shielding: If sufficient data is available – can any trend be identified in the success or failure of disclosure requests over time or in relation to different types or sources of information? For example, is there is a high disclosure rate in response to requests to the government for information about non state atrocities as compared to state atrocities or vice versa?
- Re delays: If the relevant archives and registries generate suitable data, are there any discernible trends in relation to the time taken to respond to requests?
- Note any action not listed but which is alleged to be inconsistent with an intention to allow access to information regarding the crimes and violations in question

⁹¹ These include issues raised in the Joint Principles 15, 17 and Orentlicher Principles 16, 18.

⁹² Of course this may be related to a variety of issues other than willingness to disclose: the information may simply not exist. The question is included to contextualise the processes.

3.3.1.4 Access to information via the courts

- Are judges required to produce the written reasoning behind their decisions (i.e. explanations as to how their conclusions on the law and the facts were reached)?⁹³
- Are these reasons published? If not, are they available to the parties to the case including victims and families?
- Are laws available to the public? Are court decisions⁹⁴ available to the public?
- Are court records made available to the public?
- Are there special databases on which the public can consult court decisions? Are these databases available to visit, on CD, on the internet?
- Is information about how to consult court decisions made available to the public?
- Does the public have access to information about the courts' rules and about court fees?

3.3.2 The right to justice

Much of the information on this issue will be generated from questions already set out in the General Part above. Given the resources that would be required to study potentially huge numbers of cases, the vast detail in each individual case file and the rules of confidentiality within criminal justice systems about access to such files, this section does not request that researchers create new statistics or other information. It is suggested that case studies are used. Correct sampling techniques according to clear criteria must be used and set out in advance in writing by researchers with the Country Coordinator. In the event that there have been very few processes of criminal investigation opened in relation to the crimes studied such that a global review would be feasible, the terms of this can be designed accordingly.

In line with the practice noted above, state institutions concerned must be given the opportunity to respond in order to clarify or refute allegations⁹⁵.

3.3.2.1 Investigation and prosecution authorities

Compile the available information relating to alleged incidents of the kind listed below in relation to processes involving investigation and prosecution of the crimes under examination, noting carefully in each case the sources of allegations.

This section must also deal with the police authorities if they play a role in the investigation of the crimes in question. Likewise, if the legal system is one in which a judge carries out or controls the investigation, the questions should be directed at the appropriate body making sure to separate it from the questions in the following section that are directed at trial and appeals judges.

Independence

- Bias in the selection of which investigations to open or in the selection of which incidents or accused to investigate or prosecute
- Political control or interference in the investigation/prosecution process
- External interference with or obstruction of the work of the institutions responsible for investigating and prosecuting these crimes, including by Government, political parties, economic actors, armed groups, etc.⁹⁶

93 Note different rules if any depending on subject matter, level of court, etc. The focus should be on cases (civil, criminal, administrative, special) dealing with the specific crimes and human rights violations being examined.

94 Note, *decision* is separated from *reasons* since the decision may be published but the full reasoning might not.

95 The relevant institutions will in any case be given the opportunity for comments and reactions.

96 This should also include refusal to produce documents, including classified material.

- Pressure on the police/prosecution service by foreign actors such as foreign governments and restrictions imposed by the international community to grant access to relevant information⁹⁷
- Manipulation of (or failure to comply with) the decisions taken by the police or prosecutors
- Attacks and threats on members of the police/prosecution service or their families or persons who collaborate with the investigation or prosecution
- Evidence of corruption in the police/prosecution service including mismanagement of resources, elevated salaries, nepotism, and unjustified allocations
- Absence of or insufficient cooperation, on the part of other state institutions, private institutions, other parties to the conflict, foreign governments or international organisations with the authorities

Willingness

A lack of willingness on the part of justice operators may manifest itself in the outcomes that the system produces but there are a large number of variables which limit greatly the possibility of isolating willingness as a causal factor. The focus will therefore be on investigating whether willingness has been an obstacle (albeit among many) to advancing investigations and prosecutions.

Compile the available information showing incidents of the kind described below in relation to the investigation and prosecution of the crimes in question noting carefully the sources of allegations:

- Failure to open an investigation⁹⁸
- Failure to follow evidential leads (including for example failure to interview witnesses, examine the crime scene, request documents.)⁹⁹
- Undercharging or overcharging

Examples of this would be charging illegal weapons possession, theft and assault instead of extermination, looting and torture respectively. An example of the latter would be charging genocide or crimes against humanity in relation to a low or medium level perpetrator and deliberately leading insufficient evidence so as to guarantee an acquittal.¹⁰⁰

- Any difference between the efforts made by the authority to encourage and obtain evidence from the different parties to the conflict or different sectors of society including victims of all parties to the conflict
- Whether all those who could provide information were subject to the same the rules in relevant aspects (for example on confidentiality, witness protection, mitigation or other benefits within a criminal process.)
- Unjustified delays during the investigative phase¹⁰¹
- Unjustified delays between the end of the investigation and beginning of a trial¹⁰²
- Unjustified delays between the end of a trial and the final resolution of appeals
- Any actions not listed but which are alleged to be inconsistent with bringing a person to justice¹⁰³

97 This must be contextualised and balanced by consideration of the legitimate reasons states and international organisations may have for not revealing intelligence – for example endangering the lives of witnesses or sources.

98 Include any failure to follow evidential leads even in situations where an individual is investigated, prosecuted and even convicted but where further inquiry into the surrounding facts and additional persons implicated has been prevented thereby shielding those other individuals (whether political actors, third states, private enterprise). Cross reference particularly with the chapter on Entrenched Interests.

99 Reasons given by the relevant authority should be noted given that there may be a legitimate basis for such action or inaction. In addition, reasons may cross reference with other aspects being examined such as resources, lack of legal powers, pressures/intimidation.

100 Note however that prosecutors can undercharge simply to raise the chances of successful conviction. Note also that what looks like undercharging may simply be the best attempt a state can make to avoid a potentially successful challenge by the defence regarding retroactive application of criminal law.

101 This will have to be assessed on an example by example basis. For such case studies the best information in this respect is an inventory and timeline of prosecutorial (or police) activity in an investigation. Records of pre trial procedural hearings may be misleading as to investigative efforts and so interviews of prosecutors, police and third parties (victims representatives for example) are advisable.

102 Relevant comparisons will be carried out during the analysis stage, noting that prosecution services in developed democracies and international or hybrid tribunals may produce similar delays for a variety of reasons.

103 Examples might include failure of prosecution authorities to seek arrest warrants, failure of police authorities to execute an arrest warrant and the non opposition of prosecutors to bail or interim liberation requests pending trial or appeal despite high risk of absconding.

3.3.2.2 Judiciary

Independence

- Is there a judicial council or similar oversight body for the judiciary?
- Can any organ other than courts themselves decide on the courts' competence?
- Is the authority which takes decisions on the selection and placement of judges independent of the government and political administration?¹⁰⁴ If not, does the authority nonetheless have safeguards designed to exclude improper/undue influence?
- If the government appoints judges: does it follow advice on appointments given to it by an external and independent¹⁰⁵ body? If not, can individuals appeal to such a body against government decisions on appointments (including rejection of candidates)?
- If the legislature appoints judges: same questions as per government
- Are judges obliged to report on the merits of their cases to any organ outside the judiciary?¹⁰⁶
- How are decisions to remove a judge from a particular case made? In particular are reasons publicly given; is the decision taken by an authority that is independent of government/political administration?¹⁰⁷ In what circumstances can a judge decide to remove herself/himself?
- Are all persons connected to a case (including state bodies or representatives) subject to the authority of the judge?
- Is there any restriction on judges forming associations for professional purposes including to protect their interests/safety?
- Is there a specific legal framework to protect judges from external interference?
- Is there any formal or informal mechanism that has been used to punish judges considered to be “too independent”?

Include any incidents of judges who have been removed or sanctioned and who allege that this was due to their actions in cases relating to the crimes or violations under examination

- Is it legally permissible for judges to receive any kind of payment or benefit from external groups or individuals? Must judges declare any unofficial payments or gifts received, part time, voluntary or additional posts held outside the course of their judicial employment (e.g. directorships, consultancies, board positions, law firms, memberships, trusteeships)?
- Are there mechanisms for judges to report any kind of pressure or interference they experience?
- Is the case assignment process clearly defined and transparent? Is it done randomly or if not by what other mechanism? What are the criteria for case assignment?
- Are trials public? In what situations are the public and/or the media not allowed to be present?¹⁰⁸ [Cross reference to 3.2.1.4 above]
- Must judgments include written reasoning [Cross reference to 3.2.1.4 above]
- Are court decisions published? [Cross reference to 3.2.1.4 above]

In cross referencing with Resources and Capacity issues during the analysis of the above information, note that the EU principles on independence and impartiality of the judiciary include reference to issues such as fair wages and working conditions including training.

104 Political Administration here refers to legislature and civil service.

105 In terms of function and institutional hierarchy.

106 This does not refer to informing the accused/defendant/victim/plaintiff or legal representatives thereof.

107 Again, in terms of function and institutional hierarchy.

108 Cross reference this information with the section above on access to information via the courts.

Compile the available information relating to alleged incidents of the kind listed below in relation to judicial activity relative to the prosecution of the crimes under examination, noting carefully in each case the sources of allegations.

- Bias in the determination of cases before the judiciary
- Political control of, or interference with, the judicial process
- External interference with, or obstruction of, the work of the judiciary. Focus particularly on allegations of interference by government, political parties, economic actors and armed groups. Obstruction should include refusal to produce documents, including classified material. Note the basis of such refusals.
- Pressure on the judiciary by foreign actors such as foreign governments and restrictions imposed by the international community to grant access to relevant information. This must of course be contextualised and balanced by consideration of the legitimate reasons that states and international organisations may have for not revealing intelligence
- Manipulation of (and failure to comply with) the decisions taken by the judiciary¹⁰⁹
- Attacks and threats on members of the judiciary, their staff or the families of either
- Corruption in the judiciary including mismanagement of resources, elevated salaries, nepotism, and unjustified allocations
- Absence of or insufficient co-operation with the judiciary on the part of other state institutions, private institutions, foreign governments or international organisations¹¹⁰

Willingness¹¹¹

Using case studies outline any incidences of the situations below noting the positions adopted by prosecutors, other judges¹¹², third/civil parties in the process and victims' legal representatives, as well as any explanations given by the court for its decisions.

- Failure to open trial proceedings following the conclusion of the investigative phase
- Failure to cite witnesses or to order the production of potential evidence at the request of the prosecutor
- Any difference between the judicial response to petitions made by the prosecution and by the defence to order production of potential evidence
- Conviction of lesser crimes where competent (whether charged or not), for example, where notwithstanding an indictment for looting as a war crime, a judge has discretion to convict the accused of theft or robbery
- Whether measures for the protection of witnesses were equally available to witnesses for the prosecution and the defence (including options such as ex parte hearings, testifying by closed circuit, voice distortion, joining a witness protection scheme.)
- Any delays between the end of the trial and issuing of sentence and the explanations given for these. (Note that such delays are on the face of it prejudicial to both accused and victim)
- Any delays between end of trial and final resolution of appeals
- Any actions not listed but which are alleged to be inconsistent with bringing a person to justice¹¹³

Willingness: Judicial cooperation

In relation to cooperation by the legal system (normally principally the judiciary) with foreign legal systems, *ad hoc* tribunals of all kinds, international investigative bodies with jurisdiction over the crimes under examination:

- Note examples¹¹⁴ of specific requests for cooperation in which the national LEGAL institutions have been required to act and note their response including compliance, partial compliance, delays, failure to respond, rejection of the request. Note which institution(s) was responsible for dealing with the request. (Responses of the political organs should be dealt with in the political will chapter.)

109 Including for example failure to execute arrest warrants, freeze assets, impound property.

110 Linked to manipulation or failure to comply with decisions, above.

111 The subsequent analysis must contextualise the decisions and actions listed and cross reference any underlying reasons cited by the relevant authorities, for example insufficiency of evidence, unwillingness of witnesses etc., legal argument or lack of staff or training.

112 If a panel is sitting.

113 Examples might include refusal to issue arrest warrants, granting of bail or interim liberation requests pending trial, retrial or appeal, despite high risk of absconding, remission of cases for retrial, failure to resolve motions or appeals within statutory time limits or reasonable periods. In all such cases, reasons given by the relevant authority must be noted.

114 If there is a manageable amount list all incidences; if a large amount a sample must be taken (sample selection criteria must be prepared in writing with the country coordinator.)

3.3.3 The right to reparations

The general questions regarding the independence of the institution responsible are at 3.1 and 3.2 above.

Where reparations for serious crimes and gross human rights violations are being dealt with under a judicial process, for example instead of or alongside a national reparations plan, integrate the section below with section 3.2.2.1.

Independence

Compile the available information relating to alleged incidents of the kind listed below noting carefully in each case the sources of allegations.

- Bias in the determination of applications
- Political control of or interference with the process of determining claims
- External interference with or obstruction of the work of the body, particularly by Government, political parties, economic actors, armed groups. Obstruction includes refusal to provide information
- Pressure on the body or its staff by foreign actors such as foreign governments and restrictions imposed by the international community to grant access to relevant information. This must be contextualised and balanced by consideration of the legitimate reasons states and international organisations may have for not revealing intelligence – as above.
- Manipulation of (or failure to implement) the decisions taken by the body
- Attacks and threats on members of staff or their families
- Corruption in the body including mismanagement of resources, elevated salaries, nepotism, and unjustified allocations.
- Absence of or insufficient co-operation on the part of other state institutions, private institutions, foreign governments or international organisations. Note particularly failures to freeze assets, recover or impound property
- Are full reasons given for refusal? Can a refusal be challenged by an independent¹¹⁵ body?

Willingness

Note:

- Whether claimants must take any specific action in return for receiving reparations. Note specifically if they must renounce/waiver their right to seek criminal prosecutions or pursue civil actions.¹¹⁶
- Whether the normative framework sets out any maximum time limit between the receipt of a claim and notification to the applicant of a substantive response
- What is the average time between receipt of a claim and definitive response and in successful cases between receipt of a claim and receipt of the reparations. If suitable statistics do not exist, a random sample of applicants must be used. Extreme situations of paralysis of the reparation program should also be noted, with reasons given by the body.
- Are those who take decisions on applications (or on collective reparations programmes) required to disclose interests, such as directorships, memberships, consultancies, board positions, trusteeships)?
- Is interference with the decision making of the body a crime or subject to another type of sanction?
- Does a system exist under which the implementation of the decisions of the body is monitored so as to ensure that successful claimants receive their reparations as awarded?

¹¹⁵ Both functionally and in terms of structural hierarchy.

¹¹⁶ In the sense that this could be used to block avenues that have the potential to reveal incriminating information.

Overall process:

Are transparent, objective procedures being used to identify beneficiaries of reparation programs? i.e. Are the procedures and criteria applied by the body to claims written and are they publicly available? Are the criteria such that different staff members applying the same criteria could in theory arrive at different decisions?

Compile the available information relating to alleged incidents of the kind listed below in relation to processes of determining and administering claims for reparations, noting carefully in each case the sources of allegations. Researchers are reminded that the relevant persons and institutions must be allowed to respond to the allegations:

- Bias in the decisions of the top decision-making level of the body
- Politically motivated appointments of members or staff
- Certain individuals or special categories of persons being favoured or disfavoured under the procedures or criteria¹¹⁷
- Intimidation of members of staff or their families, others who assist the work of the institution
- Corrupt practices in the administration of resources including human resources.
- Inability of the reparation program to enforce its decisions, or to convince state institutions to co-operate.
- Lack of financial or political support from state, international donors and international community in general.

3.3.4 Guarantees of non recurrence

Independence and willingness

Questions in this section refer to the decision makers who apply lustration or vetting regulations or who are in charge of disbandment and reintegration processes. They also apply to any specific commissions or other bodies set up to implement such processes.

- Are decision makers within the process required to disclose their interests (e.g. directorships, consultancies, board positions, memberships, trusteeships) ?
- Are transparent, objective procedures used to identify persons who will be subject to vetting and lustration? i.e. Are the procedures and criteria applied by the body written and are they publicly available? Are the criteria such that different staff members applying the same criteria could in theory arrive at different decisions?
- Are transparent, objective procedures used to identify beneficiaries of disbandment and reintegration programmes?
- Do the procedures comply with selected due process and non discrimination requirements?

For due process: right to be informed of reasons, right of response and of appeal
For discrimination: does the process distinguish between people on any ground other than their alleged involvement in the crimes/abuses or their service in a institution alleged to have been so involved?

¹¹⁷ While specialised attention to certain groups can be justified, entry to the programme and eligibility criteria which discriminate positively or negatively must be noted.

Compile available information relating to any alleged incidents of the kind listed below in relation to processes of lustration, vetting or disbandment and reintegration, noting carefully in each case the sources of allegations.

- Non application of the law or policy to persons convicted or currently accused of the crimes or violations under examination
- In relation to persons not subject to formal investigation or prosecution, failure to consider reliable allegations of their involvement in the crimes or violations
- Inaction in respect of persons who have been acquitted following processes that did not meet minimum standards of effective investigation¹¹⁸
- Action against persons already tried and acquitted or against whom the authorities have not proceeded, following processes that did meet the above mentioned standards
- Control exerted by the political administration¹¹⁹ over procedures or resources of the process¹²⁰
- External interference with or obstruction of the process including by government, political parties, economic actors, armed groups
- Manipulation of (or failure to implement the decisions taken under) the process
- Attacks and threats to staff implementing the process, or to their families
- Corruption in the process, including corruption involving mismanagement of resources, nepotism, unjustified allocations, admission of petitions to reintegration programmes.
- Failure to implement decisions taken by the person or body implementing the process including absence of co-operation on the part of other state institutions, for example refusal of the military, security forces or government to implement the procedures and decisions thereunder)
- Delay or inaction in the process
- Unjustified influence of international actors
- In relation to reintegration programmes only examples of politically motivated decisions directing benefits to specific sectors while denying them to others

Note that the law or policy may be designed to apply only to certain categories of persons as part of a negotiated end to hostilities, in which case a more global analysis would be required. The main focus is however on *illegitimate discrimination within the implementation of a process*. The analysis of inbuilt impartiality or lack of willingness in the law or policy itself is therefore to be distinguished from impartiality or lack of willingness in the way a *prima facie* legitimate law or policy is being applied in practice.

118 Standards will be drawn from jurisprudence based on international human rights instruments. Reliable case studies by third parties or legal determinations on the defective nature of an investigation may be used. In the absence of either case studies or determinations, no conclusions may be drawn in individual cases.

119 Supra note 103.

120 This refers to interference outside the normal executive or legislative functioning in creating the process, drafting and approving legislation to implement it and approving the budget of the implementing body.



The existence of political will is often described by scholars, practitioners and activists alike as an essential requirement for overcoming impunity for past crimes and human rights abuses. “Political will” is difficult to capture in terms of qualitative or quantitative measurements. Aware of these limitations, we have nevertheless attempted to create guidelines for gathering and systematising information that could point to the absence or existence of political will, according to a relatively narrow understanding of the term.

No universally accepted criteria exist for measuring “political will” of a state to carry out any particular set of policies. But this inquiry into political will focuses on certain words and deeds of legislatures and executives. A discourse that endorses certain policies, or fails to condemn others, the adoption of or a failure to adopt appropriate legislative measures and the size of the assigned budgets to carry them out are often seen as indicative of political will. At the same time however, a failure the political organs of state in these areas does not automatically equal an absence of political will.

In the most straightforward of cases, political will to combat impunity is weakened if those holding state power carry responsibility for past crimes and human rights violations, or are involved in other illicit activities that benefit from ongoing impunity. It may also be rooted in a lack of interest or prioritisation, the strength and influence of entrenched interests and the lack of effective citizen demand. Leaders may also lack the commitment and legitimacy to ensure consistent and long-term efforts in this area. Within institutions, complacency and attachment to the “old ways of doing things” can make it difficult to implement reforms designed to combat impunity.

Many of these interrelated aspects are covered in other sections of this instrument. Cross referencing will be carried out as necessary with the relevant data gathered and research questions asked in other chapters.

While this chapter focuses on national political institutions, researchers will also be asked to make an inventory of the *international cooperation* efforts to combat impunity in the country given their potential impact on the behaviour of national political institutions.

The overall research question in relation to political will is whether the executive and legislative authorities have the political will to combat impunity for serious crimes and gross human rights abuses under international law.

4.1 POLITICAL CONTEXT

4.1.1

Provide a brief description of the political system in the country covering the following points/issues:

- **The relationship between the legislature and executive:** describing the division of powers, explaining whether the system is parliamentary, presidential or other. Provide a basic outline of how the system works as well as the *de facto* power relationships between different political institutions.
- **The legislative branch and process,** showing how the parliament is organised, noting whether it comprises a single or double chamber and describing the legislative process for passage of bills through parliament and their enactment into law. Researchers should also list all regular or specialised parliamentary bodies that are dedicated to issues of “truth-seeking”, investigation and prosecution, reparation or non-recurrence (TJRNR)²¹ or have relevance for those issues.
- **The executive branch and process,** outlining the structure of the government and ministries noting their respective competencies and giving special attention to any regular or specialised executive bodies dedicated to TJRNR issues or having relevance to such issues.

121 “TJRNR-processes” or issues are often referred to as transitional justice.

- **Territorial organisation**, describing the system of territorial organisation: the division of the country into constituencies, regions, provinces, municipalities and so on. Outline the structure of the relevant local bodies noting whether their members are elected or appointed (and by whom) and note the competencies of local government. Note in particular the competences of any lower-level bodies that have legislative powers, especially if their competences cover TJRNR issues.

4.1.2

Provide the results of all parliamentary elections held since the end of hostilities/removal of authoritarian regime. The information should include in each case:

- Whether the elections were held earlier or later than legally required and if so why. Briefly note the assessments by any election monitoring bodies regarding fairness and transparency, if available
- The numbers and names of members of congress/parliament who were part of the previous authoritarian regime and who were alleged to have been involved in serious crimes or human rights violations under international law.¹²²

4.1.3

Give the composition of all cabinets since the end of hostilities. Include information on the party affiliation of each minister and their deputies, whether the ministers or their deputies were politically active under a previous authoritarian regime or alleged to have been involved in serious crimes/human rights violations, noting the sources of such allegations. Note any changes in cabinet combination with dates of changes. In situations where an entire cabinet has not governed until the expiration of its mandate, explain why not.

4.1.4

Note the party affiliation of ministers/junior ministers/deputy ministers in the current cabinet

If feasible, the same might be done for all parliaments since the end of the armed conflict/authoritarian regime)

4.1.5

List the ministries whose work is relevant to TJRNR-issues, with particular attention to specialised ministries (if any). Describe the competencies of these ministries in regard to these issues (cross reference with 4.1.1)

4.1.6

List any changes since the end of hostilities or fall of the authoritarian regime that have been made to the normative framework affecting the composition, structure or functioning of the political system. Explain briefly the nature and dates of the changes, under which cabinets they occurred and, if they required legislative approval, note the voting results disaggregated by party/block.

¹²² Noting the sources of allegations.

4.2 DISCOURSE

Research question:

What is the nature of the discourse of the country's political authorities on issues of redress or responsibility for serious crimes against international law committed in the past and on impunity or accountability for those crimes?

In principle it will be the task of the country researchers to produce tailored methodologies for researching the discourse of key political actors/institutions in each country. These methodologies should however follow several basic guidelines:

(a) researchers should select a group of the most relevant political actors to be monitored including members of national parliaments and national executives. The group should include persons at various levels of seniority including the highest political figures possible. The group should be chosen to be representative and should be of a suitable size taking into account the parameters of the research and practical feasibility. The sampling method will form part of the methodology and should be set out in writing and attached.

(b) "Public discourse" should be assessed through systematic monitoring of statements (as quoted in the print or electronic media or made at public gatherings). "Parliamentary discourse" refers to statements made in parliamentary debates, responses in writing or orally to parliamentary questions, and as a part of any other form of parliamentary engagement (Q&A sessions with executives for example).

(c) the parameters and method of this monitoring will be determined in each country separately.

(d) where feasible, perception studies or direct in-depth interviews with political actors can also be conducted for the purposes of this research by external specialists.

(a) Legislative branch

Research question:

What is the nature of the discourse of (and in) the country's legislature on the issues of redress/responsibility for serious crimes against international law committed in the past and of impunity for those crimes?

Sub-questions:

1. Are SCUIL or TJRNR issues mentioned in the manifestoes (programmes) of political parties with representation in the national parliament, and if so in which way?
2. Are these issues present in daily parliamentary practice (e.g. debates, work of committees, Q&A sessions)?
3. What is the parties' parliamentary discourse on TJRNR-related issues?
4. What is the parties' public discourse on TJRNR-related issues?

Obtain, or if unavailable, produce:

- Manifestoes (party programmes) of all the parties that are represented in the current parliament, with any reference to SCUIL or TJRNR-related issues highlighted.¹²³
- Information on the number and length of plenary parliamentary sessions on issues related to SCUIL and/or TJRNR.
- A summary of the results of any monitoring of parliamentary discourse that has taken place on SCUIL or TJRNR-related issues, disaggregated by faction or party.
- A summary of the results of any monitoring of public discourse on SCUIL and TJRNR-related issues¹²⁴, disaggregated by faction or party.

¹²³ If feasible in terms of costs and time the same could be done for all parliaments since the end of the armed conflict/authoritarian regime.

¹²⁴ This refers to a summary of all press monitoring, including of official press releases by the relevant authorities and general press coverage. The exact parameters of this monitoring of media will be agreed with researchers.

(b) Executive branch

Research question:

What is the nature of the public and parliamentary discourse of the country's executive on the issues of redress/responsibility for serious crimes against international law committed in the past and on impunity for those crimes?

Sub-questions:

1. What are the views of the executive on TJRNR - related issues?
2. If it is alleged that the state is responsible for SCUIL, what is the executive's public discourse on this issue (e.g. total or partial acceptance/denial, in which way and to which degree?)

Produce:

- Summary monitoring report of the public statements on SCUIL and TRJNR-related issues by the president/head of state in his/her official speeches nationally and internationally.
- Summary monitoring report of the public statements on SCUIL and TRJNR-related issues of relevant members of the executive (ministers, including the Prime Minister) and their deputies/junior ministers/advisers (if relevant) made in official speeches, nationally and internationally
- Summary monitoring report of the parliamentary discourse (see definition above) on SCUIL and TRJNR-related issues of the president/head of state in his/her official speeches and by relevant members of the executive (ministers, including the Prime Minister) and their deputies/junior ministers/advisers (if relevant) made in official speeches.

If relevant in the country context, additional attention should be paid to the public discourse of local authorities in those areas where the crimes took place or where the victims now reside, if they are not one and the same. The same should be applied to any additional key political actors who are not members of the executive or legislature but who continue to influence discourse. The inquiry into those actors should follow the same guidelines as for the executive branch and take into account the above note on researching discourse.

4.3 ACTIONS IN RESPONSE TO PAST ATROCITIES

This section looks at what action the state's political authorities have undertaken in response to the serious crimes committed in the past related to areas of "truth-seeking", investigation and prosecution, reparations and guarantees of non-recurrence).¹²⁵

4.3.1 Right to know

4.3.1.1 Passing of legislation

Research question:

Has adequate legislation¹²⁶ been passed to facilitate the right to know?

This section should show the dynamics between the legislation proposed and passed and identify where the support for these efforts has been coming from. Having looked at the discourse of the political organs and parties, the aim here is to look at the reality of the support coming from the executive, legislature and individual parties or actors for initiatives aimed at combating impunity. Linking in to the chapter on entrenched interests, researchers are also asked to describe any role that the individuals and structures who were allegedly involved in the crimes had in executive or legislative processes.

(a) Legislative Branch

Research question:

What actions has the national legislature undertaken in order to facilitate victims exercising their right to know?

Sub-questions:

1. Has the legislative branch passed any legislation or taken any other actions that facilitate or obstruct the right to know? If so which and how?
2. Which political parties or individuals supported or opposed this legislation or these actions?
3. Has the legislative branch itself made any efforts to obtain relevant information in the possession of state or non-state bodies or other states?

Obtain or if unavailable, produce:

- A brief overview of any *bills introduced* since the end of the armed conflict/authoritarian regime to change the national normative framework of the disclosure of information relating to SCUIL and the delimitation of victims' right to know. Note in each case the author of the bills and to which party they belong. Bills should be grouped by:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information and data protection
 - Other

¹²⁵ This research question covers the passing of legislation and the adequacy of the budgets approved. These can be further broken down into numerous parts, for specific legislation or budgets for each specific institution. Note that existing legislation may already be adequate.

¹²⁶ The state's legal obligations will be the relevant comparison to identify what legislation if any was *necessary* in all the sections in this chapter. The Joint-Orentlicher principles can also act as a non-binding guideline – assuming that a state which is genuinely interested in fulfilling its obligations in this area would consult existing international guidelines and see what is applicable in its case. Researchers should identify, based on the context and results of the Normative Framework chapter, the principle legislative barriers to action. Volume of legislative activity of course does not per se reflect willingness (for example if the prior legislation was adequate and simply should have been put into practice). Not only legislation but executive decrees or administrative measures when enacted to the same effect, are relevant to note.

- An overview of any *laws passed* since the end of the armed conflict/authoritarian regime that changed the national normative framework of disclosure of information relating to SCUIL and the delimitation of victims' right to know. Note in each case the author of the bills and to which party they belong. Group by:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information and data protection
 - Other
- The voting history of all parliamentary parties on the above-mentioned bills and laws.

A contextual note should also be provided, describing briefly how the voting process works if different from that described under 4.1.1 above.

(b) Executive branch

Research question:

What action has the national executive undertaken in order to facilitate information disclosure and “truth-seeking”?

Sub-questions:

1. Has the executive passed any decrees or taken any other actions that facilitate or obstruct the right to know? If so which and how? (Include also any rules or practices that facilitate or obstruct the participation of victims and civil society groups in policy debates and that affect their access to the relevant bodies)
2. Has the executive branch itself made any efforts to obtain information about SCUIL in the possession of state or non-state bodies or other states?

Obtain or if unavailable, produce:

- An inventory of any executive decrees enacted since the end of the armed conflict/authoritarian regime to change the national normative framework of disclosure of information about SCUIL and the delimitation of the victims' right to know. Note in each case the date of adoption. These executive decrees should be grouped by the following areas:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information and data protection
 - Other
- An inventory of all administrative measures introduced since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to the disclosure of information about SCUIL and the delimitation of the victims right to know. Note in each case the date the measures were adopted and the institution that adopted them. Include measures taken by local government. Again group by:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information and data protection
 - Other

4.3.1.2 Provision of resources

Research questions:

1. *Have the legislature and executive contributed to or hindered the provision of adequate resources to bodies responsible for information disclosure and “truth-seeking”?*
2. *Is the state actively fundraising whether through domestic taxation, approaches to international donors or efforts to seek other non monetary cooperation for justice mechanisms?*

In terms of collecting information about budget allocations and assessing their adequacy, this section will draw upon the results and assessments made in the section on Resources and Capacity. This section is therefore limited to obtaining additional information that is necessary in order to identify the absence, presence and extent of political will to budget adequately for TJRNR mechanisms.

(a) Legislative branch

Research question:

In which ways has the legislature contributed to/hindered the provision of adequate resources to bodies responsible for information disclosure and “truth-seeking”?

Obtain or if unavailable, produce:

- The voting history of all parliamentary parties on budgetary bills affecting the functioning of these bodies in the past five years. These bills should be grouped by:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information & data protection
 - Other

A contextual note should be provided on how the voting process works, if different from that already described for passage of normal bills and legislation.

(b) Executive branch

Research question:

How has the executive acted with respect to budgeting for the bodies responsible for information disclosure and “truth-seeking” mechanisms?

Obtain or if unavailable, produce:

- Government budget proposals over the last five years with respect to information disclosure and “truth-seeking” mechanisms, disaggregated by ministry. These budget proposals should be grouped by:
 - Non-judicial commissions of enquiry
 - Forensic bodies
 - Registers & Archives
 - Freedom of information and other data protection
 - Other

Access issue:

Identify the steps, if any, that the executive or legislature have taken to facilitate access by victims, families and the public in general to any archives or registers or to any “truth seeking” mechanisms covered in this section.

The results should be cross referenced with information from other chapters referring to victims’ access to these mechanisms in order to identify any barriers.

4.4 RIGHT TO JUSTICE

4.4.1 Passing of legislation

Research Question:

Has adequate¹²⁷ legislation been passed to facilitate criminal prosecutions of SCUIL?¹²⁸

(a) Legislative branch¹²⁹

Research question:

What actions has the national legislature taken to facilitate criminal prosecution of SCUIL?

Sub-questions:

1. Has the legislative branch passed any legislation or taken any other actions that facilitate or obstruct criminal justice mechanisms in response to SCUIL?¹³⁰ If so which and how?
2. Which political parties or individuals supported or opposed this legislation or these actions?
3. If under the national system the legislature has a role in responding to requests for cooperation coming from international or hybrid tribunals or - if extraterritorial jurisdiction is relevant¹³¹ - other states, what is its record?

Obtain or if unavailable, produce:

- An overview of all the *bills introduced* since the end of armed conflict/authoritarian regime to change the national normative framework in relation to criminal investigation and prosecution of SCUIL. The information should note the authors of the bills and the party to which they belong. Bills should be grouped by the following subject matter:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including international)¹³²
- An overview of all *laws passed* since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to criminal investigation and prosecution of SCUIL, disaggregated by author (government/MPs disaggregated by parties). Again group by:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including international)
- Voting history of all parliamentary parties on these bills and laws.
- Overview of legislative actions in response to any cooperation requests from third states or international/hybrid bodies with jurisdiction over SCUIL. Provide the voting results (if any) disaggregated by party. Pay attention to following areas of cooperation:
 - Surrenders/Extraditions of suspects
 - Evidence/witness exchange
 - Accessibility to state's territory for the body's staff including investigators

127 Again, there may be different views about the sufficiency of existing legislation. In any case, researchers should focus on any mismatch between the existence of legal provisions and their implementation in practice.

128 The concept of willingness under the Rome Statute for example applies to the 'state' as a whole, not only the justice system. The efforts of the political organs to remove legislative impediments to prosecutions are therefore included in such an analysis.

129 Ibid.

130 Note: it may be that the normative framework is adequate to allow national prosecutions and cooperation with other jurisdictions and therefore amendment is unnecessary. Cross-referencing with the Normative Framework chapter should note this.

131 Relevance in this context means where a complaint has been formally lodged with the authorities of a foreign state, or an investigation has been opened there. The mere existence of facultative jurisdiction of other states is not included. If international bodies exist with specific jurisdiction over the crimes, cooperation only within the state's obligations is covered. Any doubts can be referred to IW legal adviser.

132 To be identified with researchers.

(b) Executive branch

Research question:

What action has the national executive taken in order to facilitate criminal prosecution of SCUIL?

Sub-questions:

1. Has the executive passed any decrees or taken any other actions that facilitate or obstruct criminal justice mechanisms in response to SCUIL? If so which and how?
2. What is the record of the executive in responding to requests for cooperation coming from international or hybrid tribunals or - if extraterritorial jurisdiction is relevant¹³³ -other states?

Obtain or if unavailable, produce:

- An inventory of all *executive decrees* enacted by governments since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to criminal investigation and prosecution of SCUIL. Include the dates of adoption. These executive decrees should be grouped by:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including international)
- An inventory of all *administrative measures* introduced since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to criminal investigation and prosecution of SCUIL. Include the dates of adoption, note which institution adopted which measure and include local government institutions. Group the measures by:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including international)
- An overview of executive actions in response to any cooperation requests from third states or international/hybrid bodies with jurisdiction over SCUIL. Pay special attention to following:
 - Surrenders/Extraditions of suspects
 - Evidence/witness exchange
 - Accessibility to state's territory for the body's investigators

4.4.2 Provision of resources

Research Question:

1. *Have the executive and legislature contributed to or hindered the provision of adequate resources to institutions responsible for investigating and prosecuting SCUIL?*
2. *Is the state actively fundraising whether through domestic taxation, approaches to international donors or efforts to seek other non monetary cooperation for justice mechanisms?*

As with section 4.3.1.2 in relation to budget allocations and assessing their adequacy, this section will draw upon the results and assessments made in the section on Resources and Capacity. The questions here are therefore limited to obtaining additional information that is necessary in order to identify the absence, presence and extent of political will to budget adequately for TJRNR mechanisms.

133 Supra note 130.

(a) Legislative branch

Research question:

In which ways has the legislature contributed to/hindered the provision of adequate resources to criminal justice institutions responding to SCUIL?

Obtain or if unavailable, produce:

- The voting history of all parliamentary parties on budgetary bills affecting the functioning of the institutions in charge of investigating and prosecuting SCUIL (in the past five years). Bills should be grouped by:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including those involved in international cooperation)

An explanation of how the voting process works should accompany this information, noting whether the process for budget approval is different from the general voting process already described.

(b) Executive branch

Research question:

How have the relevant ministries acted with respect to budgeting the institutions in charge of investigating and prosecuting SCUIL?

Obtain or if unavailable, produce:

- Budget proposals affecting the functioning of the institutions responsible for investigating and prosecuting SCUIL (in the past five years). Group the budget proposals by:
 - Prosecutorial system
 - Police
 - Judiciary
 - Other relevant institutions (including those involved in international cooperation)

Access issue:

Highlight the steps, if any, that the executive or legislature have taken to facilitate access for victims, families and the public in general to criminal justice mechanisms covered in this section.

The results should be cross referenced with information from other chapters referring to victims' access to justice mechanisms in order to identify any barriers.

Perception studies carried out as part of the research on Independence and Willingness should also record the views of prosecution service police, and judicial staff regarding the division of their time and resources between SCUIL cases and ordinary criminal cases and whether this is influenced by political organs' priorities and actions.

4.5 RIGHT TO REPARATION

4.5.1 Passing of legislation

Research Question:

Has adequate legislation been passed to facilitate provision of reparations to victims?

(a) Legislative branch

Subquestions:

1. Has the legislative branch passed any legislation or taken any other actions that facilitate or obstruct reparations mechanisms¹³⁴? If so which and how?
2. Which political parties or individuals supported or opposed this legislation or these actions?
3. What reparations programmes are currently in place?

Obtain or if unavailable, produce:

- An overview of all *bills introduced* since the end of the armed conflict/authoritarian regime to change the national normative framework in relation to reparations, in each case noting the author and the government or political party to which they belong.
- An overview of all *laws passed* since the end of armed conflict/authoritarian regime changing the national normative framework in relation to reparations, in each case noting the author and government/party to which they belong. The bills referred to should cover but not be limited to those dealing with:
 - Establishment and running of reparation's programmes (national and international)
 - Recognition of state involvement in crimes (if applicable)
 - Apologies to victims
 - Establishment of memorials/facilitating victims' own initiatives for the establishment of memorials
 - Establishment of remembrance days
- The voting history of all parliamentary parties on these bills and laws.

(b) Executive branch

Research question:

Has the executive passed any decrees or taken any other actions that facilitate or obstruct reparations mechanisms? If so which and how?

Obtain or if unavailable, produce:

- An inventory of all *executive decrees* enacted since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to reparations, including the dates of adoption. The decrees referred to should cover issues including but not limited to:
 - Establishment and running of reparation programs (national and international)
 - Recognition of state involvement in crimes (if applicable)
 - Apologies to victims
 - Establishment of memorials/facilitating victims' own initiatives for the establishment of memorials
 - Establishment of remembrance days
- An inventory of all *administrative measures* introduced since the end of armed the conflict/authoritarian regime changing the national normative framework in relation to reparations, (disaggregated by institutions who adopted them, including the institutions of local government and dates of adoption. The administrative measures referred to should cover but not be limited to the following issues:

¹³⁴ The inquiry is not limited to specially created mechanisms: if victims must have recourse to existing bodies and courts for example, these should be included in this section.

- Establishment and running of reparation programmes (national and international)
- Recognition of state involvement in crimes (if applicable)
- Apologies to victims
- Establishment of memorials/facilitating victims' own initiatives on the establishment of memorials
- Establishment of remembrance days
- If relevant, a similar inventory should be made about the actions of local government, including but not limited to:
 - Establishment and running of relevant reparation programmes at local government level
 - Recognition of local government involvement (if applicable)

4.5.2 Provision of resources

Research Question:

Have the executive and legislature contributed to or hindered the provision of adequate resources to reparations mechanisms?

Sub-question:

Is the state actively fundraising whether through domestic taxation, approaches to international donors or efforts to seek other non monetary cooperation for reparations mechanisms?

Again the results of the research into Resources and Capacity will be incorporated into the analysis and only additional information is sought. Note in relation to reparations programmes the aim of this section is not to give the final assessment of the programme itself or of the nature or level of reparations made, but to identify the existence of political will to budget adequately for the bodies (if any) that have already been set up in order to deal with reparations claims.

(a) Legislative branch

Research question:

In which ways has the legislature contributed to/hindered the provision of adequate resources to the bodies responsible for reparations?

Obtain or if unavailable, produce:

- The voting history of all the parliamentary parties on budgetary bills affecting the functioning of any body that is relevant to reparations mechanisms (in the past five years). This would include, but not be limited to bills dealing with:
 - Reparations commissions
 - Bodies overseeing construction or maintenance of monuments
 - Bodies overseeing organisation of commemorations/remembrances

A note explaining how the voting process works should accompany this information if voting on these budgets was different from the usual process already outlined.

(b) Executive branch

Research question:

How have the relevant ministries acted with respect to budgeting the reparations programme or other institutions responsible for the provision of reparations?

Obtain or if unavailable, produce:

- Budget proposals affecting the functioning of the reparations programme or other institutions in charge of reparations (since the establishment of the programme or alternatively in the past five years). This would include, but not be limited to:
 - Reparations commissions
 - Bodies overseeing construction or maintenance of monuments
 - Bodies overseeing organisation of commemorations/remembrances

Access issue:

Highlight the steps, if any, that the state has taken to facilitate access for victims, families and the public in general to reparations mechanisms covered in this section.

The information should be cross referenced with information from other chapters referring to victims' access to reparations in order to identify any possible barriers.

4.6 GUARANTEES OF NON-RECURRENCE

In this section, researchers are requested to use the information collected in the subsection 1.5.3 of this instrument as a reference point

4.6.1 Passing of legislation

Research Question:

Has adequate legislation been passed to facilitate measures to guarantee non-recurrence of SCUIL¹³⁵?

Group by:

- *disbandment of parastatal and unofficial armed units alleged to have been involved in SCUIL*
- *reintegration of demobilised fighters and child recruits into civilian life*
- *vetting/lustration in relevant state institutions*

(a) Legislative branch

Research question:

- 1 Has the legislative branch passed any legislation or taken any other actions that facilitate or obstruct vetting, lustration or disbandment measures? If so which and how?
2. Which political parties or individuals supported or opposed this legislation or these actions?

Obtain or if unavailable, produce:

- An overview of all *bills introduced* since the end of the armed conflict/authoritarian regime to change the national normative framework in relation to vetting, lustration or disbandment measures, in each case noting the author and the government or political party to which they belong
- An overview of all *laws passed* since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to such measures in each case noting the date, author and the government or political party to which they belong
- The voting history of all parliamentary parties on these bills and laws

¹³⁵ Note: for reasons of time and resources, the scope of the inquiry into non-recurrence is limited to these particular measures that are highlighted in Principle 37 of the Joint-Orentlicher Principles. There are of course many and varied measures that states can take to promote non recurrence thus the inclusion of other measures can be discussed.

(b) Executive branch

Research Question:

Has the executive passed any decrees or taken any other actions that facilitate or obstruct measures to guarantee non-recurrence of SCUIL? If so which and how?

Obtain or if unavailable, produce:

- An inventory of all executive decrees enacted by governments since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to vetting, lustration or disbandment measures, including the date of adoption
- An inventory of all administrative measures introduced since the end of the armed conflict/authoritarian regime changing the national normative framework in relation to such measures. In each case note the date of adoption, the author and the government or political party to which they belong (including local government bodies).

4.6.2 Implementation of measures

Research Question:

Have measures of the following kind to guarantee non recurrence of SCUIL been instituted?

- Disbandment of parastatal and unofficial armed units alleged to have been involved in SCUIL
- Reintegration of demobilised fighters and child recruits into civilian life
- *Vetting/lustration in relevant state institutions*

For each of the measures adopted, note the current state of implementation as:

- Not being applied
- In progress
- Completed

Access issue:

Highlight the steps if any that the state has made to inform victims, families, civil society and the public about these measures and to give such groups access to the regulations, policies and decisions of the bodies that implement them.



This chapter is designed to explore a specific kind of structural issue that can favour impunity or accountability: the use and abuse of *de facto* powers by informal or formal national and foreign interest groups. In the latter category a wide spectrum from private business and foreign governments to international criminal networks is potentially relevant.

The focus is to identify groups or individuals that, due to their particular interest in maintaining impunity, impede the proper functioning of judicial and other processes aimed at providing redress to victims or impede the implementation of non-recurrence mechanisms. Their interest in maintaining impunity may originate in a variety of reasons, for example their direct involvement or complicity in serious crimes under international law or because the continuation of their current influence depends, at least in part, on securing impunity in relation to those crimes.

The *de facto* powers of such groups and individuals may be exercised through diverse mechanisms, sometimes making use of their access to formal institutional structures, or through more covert or extra-institutional means. They may influence parliament or even force passage of amnesties, or use their influence to block legislation that would facilitate prosecutions. They may act to intimidate witnesses, prosecutors, and judges, intercede to destroy evidence, or threaten to withhold resources or political support from parties and individual officials. Their actions can often play a major role in the functioning of any transitional mechanisms which they consider would jeopardise their interests.

The kind of groups envisaged would include among others the following actors:

- Representatives of former warring factions
- Private sector (corporate interests)
- Paramilitary organisations
- Guerilla, rebel groups
- Subversive or terrorist movements
- Foreign governments
- Organised crime
- Churches or religious authorities
- Professional associations

This chapter will require the most country-specific adjustment by researchers and as such should be developed in close cooperation with national partners. What follows are outlines of potential research questions forming a basis on which relevant topics and questions can be created.

The overall research question is: Do any entrenched interests exist that obstruct or otherwise influence TJRNR processes and if so in what ways?

Map all the possible entrenched interests in the country

These are understood to be: all interest groups and individuals other than state institutions and political parties that are alleged to have actively obstructed processes designed to respond to serious crimes and human rights abuses under examination, i.e. criminal justice, information disclosure/"truth-seeking", reparations of all kinds, disbandment and reintegration and any vetting or lustration processes. In this initial stage, every such interest group should be described as fully as possible, with a short account of its structure, the interests it protects, its methods of operation and several concrete cases in which it is alleged to have acted. This initial description should also contain the sources of the allegations.

The mapping should be broad enough to consider the likely sources of information on the existence and functioning of such structures - such as journalists, analysts, diplomats and other knowledgeable parties.

On the basis of this initial description, formulate and apply a suitable methodology to document any allegations of the existence and behaviour of entrenched interests under the following heads:

- **Truth:** are these groups preventing full disclosure of information related to SCUIL? If so how?
- **Justice:** are these groups obstructing justice processes at any stage (investigations/prosecutions/trials)? If so, how (for example refusing to testify, tampering with evidence, intimidating witnesses, judges, prosecutors)?
- **Reparations:** are these groups obstructing reparations and if so, how?
- **Non-Recurrence:** are these groups preventing and obstructing the non recurrence measures listed above, and if so, how?

Further research into the specific interest groups should try to cover these four areas in a well-sources matter, providing primary sources where possible. A separate protocol regarding information collection, storage and sharing will regulate confidentiality issues and data management procedures in this regard.



The aim of this research instrument is to facilitate an investigation into the obstacles to truth, justice, reparations and non-recurrence measures and provide the basis for monitoring a state's efforts to reduce these obstacles and to comply with its obligations. In order to ensure a holistic and fair inquiry it is vital not to ignore factors that are wholly or partially beyond the control of the state but which have nonetheless played a role in obstructing transitional justice processes and influencing the success or failure of state efforts to respond to past atrocities.

The engagement of victims and others with the issue of impunity may be significantly affected by a plethora of societal factors, each having its own causes and wider effects. Examples of such factors include a limited demand for non judicial commissions of inquiry or prosecutions, a lack of willingness to participate in legal proceedings, a general aversion to civic involvement, a lack of knowledge about or interest in TJRN issues, and negative perceptions about those issues. There may also be basic practical reasons for people's engagement and interest in impunity or lack of it: distance, finances, language, personal commitments, health, the level and tone of news coverage of the issue.

Overcoming impunity also requires that victims know, value and act on their rights to truth, reparations and justice. It is important that they are aware of their options and the available processes. At the same time their rights and efforts to find redress must be at least accepted by the wider society in which they live, even if there is no significant tangible support given. Public acceptance or support for accountability can be a crucial factor in generating the political will and the institutional commitment to tackle impunity effectively. This is especially the case in countries in which the state institutions are themselves accused of responsibility for crimes and human rights violations against civilians but it is also of relevance when institutions are responsible for investigating and prosecuting crimes that are alleged to have been committed by non state actors. On the personal and societal level, victims of crime and human rights abuse and their families can continue to be stigmatised or even criminalised, with the result that their legitimate demands for justice meet with little family or general public support or even outright opposition.

This chapter will therefore look at the composition of the society and, against the background of the processes and institutions examined in the preceding chapters, will attempt to research the attitudes of victims and members of society at large in relation to transitional justice processes already completed or under way. It will also look for reasons behind their views, actions and inactions relative to those processes. In relation to victims, the priority focus will be on the experiences of those who have attempted to access information, justice and reparations processes.

In addition to focussing on victims and the general public, a third social group to be studied will be civil society. In some countries this sector may be relatively weak - organisations engaged in impunity issues may be small or lacking the resources or capacity to mount effective and sustained efforts. In other countries, civil society may be particularly powerful, well resourced and the origin of many services, thereby filling the gaps left by a lack of state action.

It is posited here that underlying societal conditions can influence the response to mass atrocities from the individual to the society and government thereby impeding the processes in a wider structural sense. Examples sometimes referred to are deep societal divisions of all kinds, systematic racism or discrimination, limited possibilities for civic participation, wide-scale poverty,¹³⁶ a climate of fear of the perpetrators and their allies, a lack of trust in the state institutions, basic lack

136 In countries with high poverty levels, injustice may be perceived as an issue of general living conditions. People may have other more immediate concerns and demands on the state related to their basic needs. For example, responses from the justice system for human rights may not be considered a priority or persons may lack the basic means to seek it, therefore a reduced demand for criminal justice must be contextualised.

of knowledge about rights, entrenched patterns of thinking and behaviour such as extreme ideologies, political patronage and social phenomena elsewhere referred to as a “culture of violence”¹³⁷ and a “culture of impunity.”¹³⁸

Although research into all these conditions is beyond the scope of the initial research, this chapter is intended to flag up for future investigation societal conditions that may lie at the source of lingering impunity - not only behind the opinions and behaviour of victims, the public and civil society, but behind the laws, resource allocation and distribution and political will of all the persons and institutions to which this research directs attention.

The overall research question for this chapter is which societal factors obstruct or facilitate transitional justice processes and in what specific ways?

FIELD OF STUDY

In the case of research following an international armed conflict, the geographical coverage of mapping exercises and other forms of inquiry listed below will depend on an initial hypothesis by the researcher(s) as to the origins of societal influence on the relevant transitional justice processes. Inquiries must be undertaken in respect of the countries whose authorities are responsible for investigating, prosecuting and providing remedies to victims but it can also extend to other countries, such as those to which victims and families fled as refugees and are now living if it is suggested that factors in *that* society influence their engagement with such processes.

ATTITUDES

This chapter is less structured than previous chapters since its content will be more concretely defined with local input. Where there are no suitable existing studies, researchers will be required to propose suitable methodologies for perception studies and can commission external specialists as required, funding permitting.

6.1 GENERAL PUBLIC

Mapping

- Obtain basic demographic data: population size; age structure; mortality rate. Disaggregate all the foregoing if possible by ethnicity, race, sex, socioeconomic group, population concentration, religion, language and literacy level and such other categories as are relevant to the conflict/repressive or current period.¹³⁹
- Obtain basic economic data: a short economic overview of the country¹⁴⁰; GDP, GDP per capita and the GDP growth rate since the end of hostilities/repressive regime, the GDP composition per sector - industry/agriculture/services; labour force information (labour force by occupation sector, unemployment rate, percentage of population living below poverty line, specifics of income distribution including urban vs. rural, along ethnic lines, if applicable) and such other categories relevant to the conflict or current period.

137 A “culture of violence,” may be considered as the use of violence not as a last resort but as an initial means to resolve conflicts, repress dissidence, or defend interests. Violence as a part of daily experience then becomes the norm, is no longer shocking and seen as not demanding a response.

138 A “culture of impunity” implies the expectation of impunity not only on the part of victims but also on the part of perpetrators, the general public, those who exert influence and power in the society and even those responsible for investigating, prosecuting and punishing perpetrators of violence. An entrenched “culture of impunity” can be one of the outcomes of extended periods of military or other authoritarian rule or armed conflict (often combined with unchecked power of the society’s elites) and the commission of large scale human rights violations. It is often associated with a shared experience of judicial and law enforcement institutions having been non-functional, complicit or directly involved in serious crimes and human rights abuses.

139 Relevant sub-categories should be identified by researchers.

140 Original work is not expected: please use existing data.

Material aspects

- How does the domestic legislation regulate if at all the participation of a non-victim (citizens and non citizens alike) in transitional justice processes? List their rights in relation to each of these processes.

For example may an individual volunteer a testimony, act as victim representative in court, observe the process, obtain access to registries and archives, lodge a reparation request on behalf of the victims? Cross references should be made as necessary with the normative framework section.

- Has the state or other relevant body conducted an outreach policy to inform the public and victims (wherever they may be located) of the transitional justice processes and about how to participate in them?
- Note the number of people who have attended public trials/hearings of NJCIs in the context of a suitable quantitative comparative.¹⁴¹
- Note the number of requests to access archives/registries made by non-victims (if such applications are competent); express this figure also as a percentage of the total number of such requests if possible.
- Note the number of individuals¹⁴² for whom reparations have been claimed (together with a relevant comparable such as most reliable approximate number of victims).

ATTITUDES

Perceptions

Collect all relevant research, if any, conducted since the end of hostilities/repressive regime on the following topics, or in the absence thereof design and carry out a public survey covering:¹⁴³

- The extent of the general public's knowledge about the past crimes or human rights violations, the alleged perpetrators and, if relevant, any plan or policy alleged to have been behind them
- The extent of the general public's knowledge about the existence of transitional justice processes
- Public attitudes towards the crimes, violations and policies
- Public attitudes towards the victims of the crimes or violations
- Public attitudes towards the perpetrators (including convicted, formally accused and those in relation to which allegations have been made)
- Public attitudes towards the transitional justice processes that have taken place to date
- Level of expectation of accountability for the crimes or violations

Discourse

Collect all relevant existing research, if any, conducted since the end of hostilities/repressive regime relating to media coverage of the following topics¹⁴⁴:

- The crimes or human rights violations in question, and any policies alleged to have been behind them
- Alleged, accused or convicted perpetrators
- Public attitudes towards the crimes, violations and policies
- Public attitudes towards victims of the crimes or violations
- Public attitudes towards transitional justice processes that have taken place so far

Researchers may also invite a representative group of leading journalists to give their views on the trends in reporting and public opinion on the above issues over recent years.

141 This may be the number the commission itself estimated or aimed for, the victim population as a whole, the entire population, or similar regional figures if they exist.

142 Or communities if collective claims are made. The relevant comparable will depend on whether information on the total number of alleged atrocities is organised in the same way as claims (by individual, community, incident, perpetrator for example.)

143 Topics on which no research has been done or where existing research requires updating/extension can be prioritised for IW perception studies.

144 Ibid.

6. 2 VICTIMS

Mapping

- Obtain basic demographic and economic data as available (estimates of the number of victims of serious crimes and human rights violations under examination, their citizenship, territorial distribution, gender, description of their social status including ethnicity and education levels. Data on the distribution of crimes by social sector, for example ethnicity, gender and the current geographical location of victims is also recommended.)

Material factors

- How does the domestic legislation define a victim's legal status?
- What rights does a victim have in relation to transitional justice processes of criminal prosecutions, non-judicial commissions of inquiry, reparations and non-recurrence measures?

Examples here include whether victims can file legal proceedings, obtain access to registries and archives and claim reparations. Were they consulted in relation to non-recurrence measures? Cross reference this with the normative framework chapter to avoid duplication.

- Are there any specific state bodies in charge of working with victims (or dedicated teams/departments within the relevant institutions, including for example legal aid, victim support units, sexual offence victim support)?
- How does the state regulate the formation and functioning of non-state bodies including traditional mechanisms that play a role in providing responses to the crimes/violations?

Is this regulation on the face of it neutral or does it hinder or assist such bodies?

- Do victims speak a language other than the official one? If so what mechanisms do the transitional justice processes have in place to ensure access for speakers of such languages?
- If victims are spread over wide geographical area, what mechanisms do the transitional justice processes have in place to ensure access for them?
- Has the state conducted an outreach policy towards victims informing them of their rights and of the processes?
- Do users of any of the transitional justice processes have to pay for the service? Can it be claimed back? Is pro bono assistance made available by the state?
- If victims are citizens of other countries, are there any state-imposed travel restrictions (for example visas)?

ATTITUDES

Perceptions

Collect all relevant existing research, if any, conducted since the end of hostilities/repressive regime on the following topics, or in the absence thereof design and carry out a survey of victims covering:¹⁴⁵

- The extent of victims' knowledge about the past crimes or human rights violations, the groups or institutions to which the perpetrators belonged and any policies alleged to have been behind the violence
- Victims' attitudes towards the crimes, violations and policies
- Victims' attitudes towards perpetrators: What should happen to them? What should be the state's or other group's response to the situation?
- Extent of victims' knowledge about the legal and other remedies they have
- Extent of victims' use of these remedies (this will comprise any element of participation from filing a complaint to acting as a witness, or giving testimonies to a NJCI.)
- What do the victims perceive as the biggest obstacles to them obtaining truth, justice, reparations and measures of non-recurrence? (Surveys must cover those who tried to achieve redress and those who did not.) Include logistical obstacle for example financial, travel related, other.

¹⁴⁵ Supra note 142

- What are victims' attitudes towards the transitional justice processes that have taken place so far¹⁴⁶? (Both those who have engaged with them and those who did not)
- Is there an expectation of redress for the crimes and violations on the part of victims and families?¹⁴⁷ Is this different from their expectations in relation to common crime?

It is important to find out if victims are not demanding certain responses not because they do not want them or feel they have a right to them, but because they have no expectation that their calls will be heard.

Discourse

Collection all relevant existing research, if any, conducted since the end of hostilities/repressive regime on the following topics¹⁴⁸:

- The extent of public visibility of victims and their demands
- The content and level of the public and political discourse on victims

Media coverage obtained under Chapter 4 may provide suitable sources as well as specific coverage of victims and victim issues, monuments and other public memorials, relevant reviews of media, parliamentary and governmental discourse.

6. 3 CIVIL SOCIETY

Mapping

- Give an overview of civil society organisations working on issues directly related to impunity and transitional justice processes or related human rights issues.¹⁴⁹ Include a description of the fields of work, size of organisations/groups, their constituencies and territorial representation. Note which, if any, have offices or extend services in the areas where the victims and their families now live, particularly in situations of ethnic cleansing and refugee flight.
- Are there any civil society organisations providing direct services to victims and families including for example legal aid, victim support units, sexual offence victim support, interpreters, logistics?

Material factors

- What is the legal normative framework for the functioning of civil society organisations in the country? Are there any differences between the framework for civil society organisations that deal with impunity or related issues and those who do not?
- Do the civil society organisations dealing with impunity or related issues function on the basis of membership? If so what is the level of membership of those organisations compared to other civil society organisations in the country?
- What are the legal financial requirements for the functioning of civil society organisations? Are there any differences between the civil society organisations that deal with issue of impunity or related issues and those that do not?
- What are the main sources of financing of the civil society organisations dealing with impunity and related issues since the end of hostilities/repressive regime? Disaggregate this information if possible by: private donations from citizens, donations and grants from government; donations and grants from foreign donors both state and private.
- What is the security status of civil society organisations dealing with impunity or related issues? Provide a brief overview of the security situation for those organisations since the end of hostilities/repressive regime (numbers of reported incidents of intimidation, assaults, assassinations, disappearances, noting who was alleged to be responsible).

¹⁴⁶ Since this is a central part of the inquiry, original research will be carried out wherever possible. Results may also guide subsequent specialised studies by IW or others on specific barriers that victims see as the most problematic.

¹⁴⁷ Supra note 142

¹⁴⁸ Ibid.

¹⁴⁹ Related human rights issues would be those that focus specifically on victim groups or their families or on aspects directly linked to transitional justice processes. Examples would include obtaining personal documentation for victims (in particular refugees), family reunification programmes and asylum claims.

ATTITUDES

Perceptions

Collect all relevant existing research if any conducted since the end of hostilities/repressive regime on the following topics or in the absence thereof carry out a study of¹⁵⁰:

- Public perceptions of the civil society organisations that work on impunity or related issues
- Victims' perceptions about the work of these organisations. Have they heard of them? Of those who have received help from them - what kind? What kind of services would they like to see civil society organisations providing?
- Perception among civil society organisations themselves of the transitional justice processes, of state bodies' efforts in this area, of victims' issues and of public opinion.

Discourse

Collect all relevant research if any conducted since the end of hostilities/repressive regime on the following topics¹⁵¹:

- The level of public visibility of the civil society organisations dealing with impunity or related human rights issues.
- The public and political discourse about the civil society organisations that deal with these issues

Media coverage obtained under Chapter 4 and specific coverage of victims and victim issues, monuments and other public memorials as well as reviews of media, parliamentary and governmental discourse on these issues may provide suitable sources.

6.4 UNDERLYING FACTORS

As noted above, researchers are asked to conduct preliminary research and on the basis of this prepare a report flagging up potential areas for further study of underlying factors which facilitate or obstruct accountability. The report may recommend further study of the effects of these factors upon specific social groups and institutions¹⁵² or on different transitional justice processes. Researchers should also highlight any cross cutting cultural themes arising from this preliminary research that should be borne in mind in the design of the attitude research activities under sections 6.1-6.3 above.

150 Supra note 142

151 Supra note 142

152 Examples would include victims, opinion makers, decision-makers, civil society representatives, the legal profession (particularly judges and prosecutors), armed and security forces, political parties and government bodies.



The following are the definitions of key terms used in the instrument. Other specific terminology will be defined in the text of the section in which it appears.

A. IMPUNITY

Impunity means *the impossibility de jure or de facto of bringing the perpetrators of violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.*

Measures designed to prevent recurrence of such violations, while not amounting to accountability as such, are a crucial additional component of an adequate state response.

IW believes impunity to be a consequence of identifiable obstacles in six key areas which are the focus of the research instrument: normative framework, institutional resources and capacity, independence and willingness, political will, influence of entrenched interests and societal factors. The instrument is designed to identify with precision the present-day obstacles that impede an adequate fulfilment of state obligations regarding past crimes.

The focus is on responses to *serious crimes and gross violations of human rights under international law* as defined below. Responsibility includes a criminal law dimension (individual responsibility and state obligations to establish jurisdiction over individuals and over crimes) and a human rights law dimension (state obligations to provide effective remedies to victims).

In terms of state responsibilities, the focus is on the national institutions that ordinarily would play a role in responding to mass atrocities. It is acknowledged however that in some situations there will be an issue of complementarity between these domestic institutions and international bodies or even foreign states that may exert jurisdiction and the research therefore covers these possibilities.

IW sees impunity not as a problem confined purely to legal systems or to the administration of justice but as a symptom of weaknesses in all three branches of state and so includes these within the scope of its inquiry. The research also extends beyond state institutions to enquire whether the influence of non state actors and societal factors can be crucial to the success or failure of transitional justice initiatives.

B. SERIOUS CRIMES AND GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL LAW

- Genocide
- Killing (as a crime against humanity, war crime, or other violation of the right to life as defined in human rights law)
- Enforced disappearance as a crime against humanity or as otherwise defined in international human rights law)
- Torture (as a crime against humanity), cruel treatment (as a war crime) or any act qualifying as torture or other cruel inhuman or degrading treatment according to international human rights law
- Sexual violence (as a crime against humanity or war crime or amounting to a violation of international human rights law)
- Persecution (as a crime against humanity or comparable deprivation of fundamental human rights)
- Deportation or forcible transfer,¹⁵³ (where amounting to a crime against humanity)

153 Commonly called forced displacement.

IW has chosen this formulation in order to allow its research to include a slightly wider range of both conduct and country situations than may have been covered by limiting the study to genocide, crimes against humanity, war crimes and torture.¹⁵⁴ In addition, the list noted above does not in any way purport to be an exhaustive list of all international crimes or gross violations of human rights. In this respect, IW coincides with the practice of many non-judicial commissions of inquiry and monitoring bodies which also work with a combined category of norms from both international criminal law and human rights law.

In relation to the selected serious crimes under international law, for the purposes of illustration this research instrument refers to the definitions of crimes contained in the Statute of the International Criminal Court (Rome Statute) and the Elements of Crimes under the ICC regime. In relation to the selected gross violations of human rights, IW will refer to definitions from international human rights law according to accepted sources of treaty, custom and general principles of law. On application of the instrument to specific country situations however, the instrument will of course be adjusted to reflect the law applicable to the state, crimes and time period under examination.

Each in-country research programme will focus on crimes and violations occurring during a defined time period that will provide a sufficiently representative and relevant historical basis for the study of present day impunity. A baseline of crimes against which one can compare state performance on investigation, prosecution and other remedies will be identified for each state according to the available relevant and reliable data.

The research will take into account crimes and violations committed by the following state and non-state actors. IW may adopt definitions of these actors commonly used and accepted by the international community, courts, non-judicial commissions of inquiry, the parties to the conflict and civil society in particular countries where it conducts research and therefore will not give generic classifications of these groups here:

- State armed forces
- State police force
- Other state security forces
- State intelligence agencies
- State, unofficial or non-state militias
- Armed opposition groups of all types

The research is not directed towards individualising criminal accountability. ‘Perpetrator’ will only be used to refer to persons who have been convicted in proceedings that have been generally classified as fair and guaranteeing due process. Otherwise, in line with the presumption of innocence the term ‘alleged perpetrator’ or ‘implicated in’ will be used.

C. ACCOUNTABILITY

Accountability implies the non-existence of impunity (as set out at A above) in respect of specific crimes and perpetrators. In line with established international principles however, satisfactory responses to serious crimes and gross human rights abuses under international law also include the satisfaction of victims’ right to know, and the right to reparations. Finally, international principles recommend that states take additional measures to guarantee the non-recurrence of the offending conduct. For this reason, IW also identifies and analyses obstacles to reforms measures designed to prevent a repeat of violations.

¹⁵⁴ IW wishes to include repressive country situations not amounting to armed conflict or involving widespread or systematic attacks against a civilian population but in which nonetheless atrocities have taken place and research into the responses to them is warranted.

IW believes that impunity can be considered to have been effectively addressed when the following occurs:

- Full disclosure of the facts of, individual and state responsibilities for, and policies that led to serious crimes and gross human rights abuses in order to preserve the collective memory from extinction and, in particular, to guard against the development of revisionist and negationist arguments.
- Genuine investigations and prosecutions and, in the case of conviction, due punishments of those responsible for serious crimes and gross human rights abuses
- Effective institutional reforms and other measures intended to guarantee the non-recurrence of serious crimes and gross human rights abuses, the (re) establishment of the democratic rule of law and protection of human rights.
- A society in which impunity is no longer expected or accepted and a culture of human rights and rule of law prevails.

D. VICTIM

IW will adopt an overall definition of victim in line with that of international human rights law, that is to say persons who individually or collectively suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute serious crimes and gross human rights violations under international law.¹⁵⁵ (Note, this includes family members who have suffered harm as a result of the crime/violation.)

In the aspects of research relating to victims IW will endeavour to reflect relevant data concerning victims including:

- Age
- Sex
- Ethnic origin
- Language
- Religion
- Socio economic situation
- Territorial distribution

E. KEY STATE INSTITUTIONS

This refers to the state institutions responsible for discharging a state's obligations to investigate, prosecute and provide reparations and other remedies to victims. Unless otherwise indicated in the text of the instrument, these institutions will include:

- Police and investigative bodies
- Prosecuting authorities
- Court administrations and Judiciary
- Institutions administering archives and registers
- Special bodies (such as ad hoc chambers, non judicial commissions of inquiry, reparations commissions, vetting boards and similar)
- Legislature or other law and policy making bodies

¹⁵⁵ The definition of victim is taken from *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*, United Nations GA Res. A/RES/60/147, adopted 16 December 2005, Annex.

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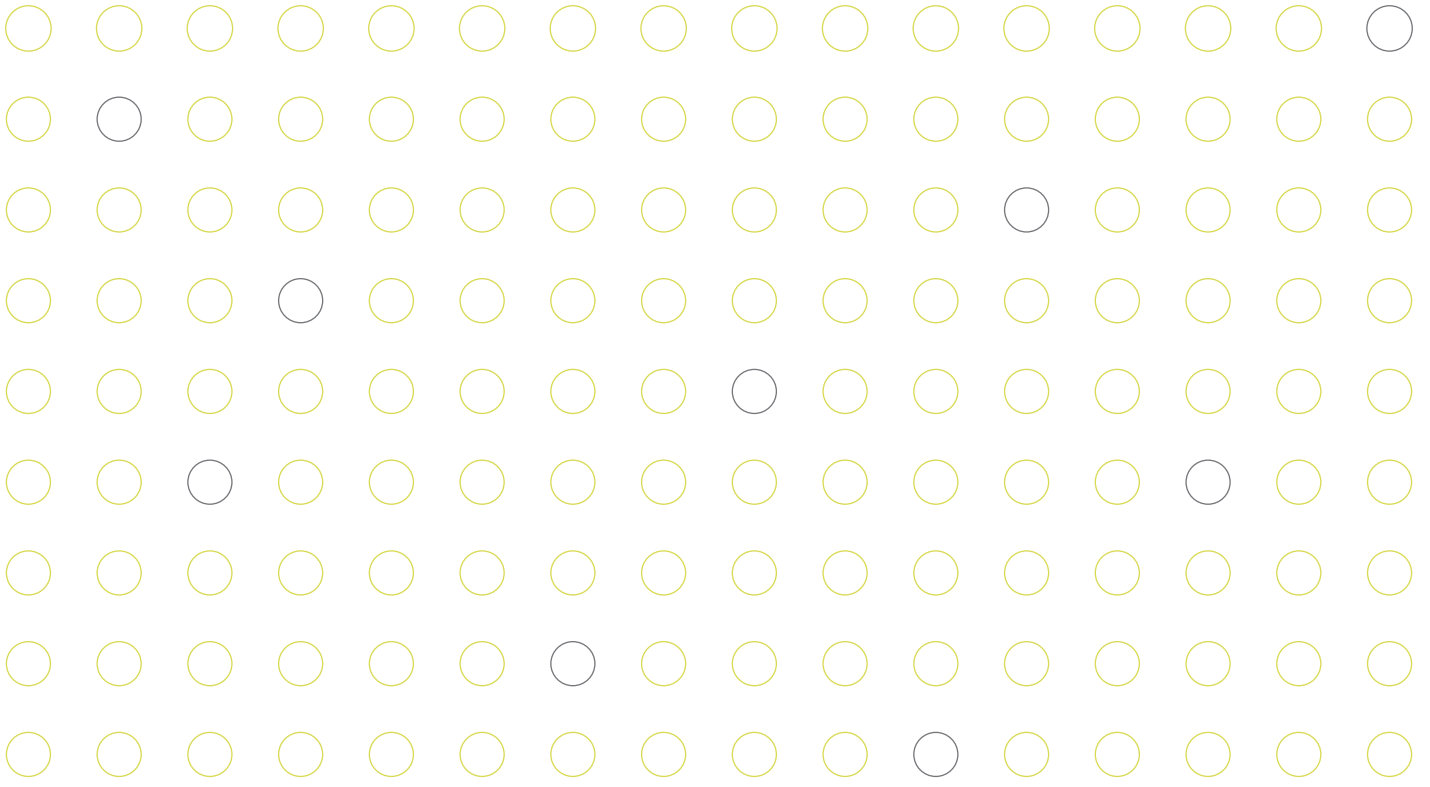
Dr Todd Landman of Essex University read and reviewed our own subsequent version of the instrument in December 2006, enriching it with his numerous comments and suggestions. We are grateful for the time and effort he invested, and greatly appreciate his encouragement and support for our research approach.

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