

Options for the establishment of a Standing Independent Investigative Mechanism (SIIM)

September 2022



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Executive summary

- There is broad consensus that while Accountability Mandates fulfill an important role in the human rights and international criminal justice architecture, there is a need for rethinking the process of their establishment and operation.
- The current practice of creating new Accountability Mandates in a largely piecemeal fashion every year, each with the same well-documented challenges concerning effectiveness and efficiency, particularly during the start-up and closing phases, should be addressed.
- Recent consultations and studies by the International Commission of Jurists (ICJ) and the Oxford Institute for Ethics, Law and Armed Conflict (Oxford), which include the views of key stakeholders, independently concluded that it is time that a Standing Independent Investigative Mechanism (SIIM) or similar mechanism be created.
- The establishment of a SIIM would address many of the existing challenges faced by Accountability Mandates, leading to greater effectiveness and efficiencies.
- A SIIM would support and complement the existing human rights and international justice architecture, including the work of the International Criminal Court (ICC).
- Such a SIIM should be functionally independent of the Office of the High Commissioner for Human Rights (OHCHR) and other UN agencies but could well be linked to them in a consultative and operational capacity - and reliant on them for certain services.
- A SIIM would have two functions:
 - conduct investigations with a view to gathering information and evidence for potential use in criminal and other legal and administrative proceedings; and
 - use its capacity to act as a specialist service provider to existing and future UN body-created Accountability Mandates, including relevant fact-finding missions and commissions of inquiry.
- A second option is to establish an Investigation Support Service Provider, which would provide specialized support services to Accountability Mandates.

1. Background

In April 2022, the ICJ, supported by the Federal Foreign Office of Germany, formed a Group of Experts to assist in providing advice on the options for the establishment of a SIIM. Those consultations informed the basis of the ICJ's recommendations contained in this Paper. While the Paper reflects views for the most part shared in common by the experts, the formulation of the document and the recommendations are the ICJ's alone.

The Paper has been produced against the background of the ICJ's ongoing work in this area, including in the context of Human Rights Council Events in [2018](#) and [2019](#); a 2019 two-part blog post in respected legal blog *Opinio Juris* titled *Is It Time to Create a Standing Independent Investigative Mechanism (SIIM)?* ([Part 1](#) and [Part 2](#)), which reflected the ICJ's thinking at the time; and two [conferences](#) the ICJ held with the Kingdom of the Netherlands in 2020 and 2021, which resulted in the joint December 2021 outcome report "[The Future of Accountability Mechanisms: Twenty Recommendations.](#)"

2. Process

The ICJ consulted with the Group of Experts on two occasions. Ten questions were discussed, as set out below. The Chatham House Rules applied. The first convening took place online. The second convening took place in a hybrid online/in-person setting at the ICJ's offices in Geneva. A draft of this Paper was sent to the experts for their comments before it was submitted. The members of the Group of Experts and other participants are listed in an **Annex**. The process was coordinated by Kingsley Abbott, the ICJ's Director of Global Accountability and International Justice.

3. Introduction

Around the world, combatting impunity for serious human rights and international humanitarian law violations and abuses, particularly those that amount to crimes under international law, remains a significant challenge. While the international legal framework has been well established and refined over decades and robust national laws now exist to address impunity in many jurisdictions, there remains an enforcement gap at the international level where national responses are absent or ineffective.

The establishment of *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda in the 1990s followed by the adoption of the Rome Statute of the ICC and other *ad hoc* tribunals have all gone some way to narrow that gap. However, the existing machinery is insufficient. Many States on whose territory or under whose jurisdiction the most serious situations of violations occur are not party to the Rome Statute, and the Rome Statute is limited in both its subject matter jurisdiction and its exclusive focus on individual criminal responsibility. The discharge of prompt and effective investigations of emerging crisis situations to pave the way for a greater number of prosecutions and convictions of perpetrators of crimes under international law is sometimes beyond the working modality of the ICC.

4. Accountability Mandates

One response to the accountability gap has been rapidly increasing calls by victims' groups and other stakeholders for UN bodies, including the UN Human Rights Council, to create new and innovative mandates whose functions go beyond human rights documentation and reporting,

traditionally focused on *state responsibility*, to include accountability functions which, in addition to state responsibility, also include elements of *individual criminal responsibility*.

Over the years, these accountability functions have evolved to include not only the identification of perpetrators, but also the collection, consolidation, and preservation of evidence for use in future legal proceedings, including criminal and administration proceedings, and the preparation of case files. Where appropriate, some mandates even include a specific reference to cooperating with the International Criminal Court (ICC).

The relevant family of UN investigative mandates, most of which have been created by the UN Human Rights Council, include most recently the:

- a. [International Independent Investigative Mechanism for Syria](#) (IIIM) (2016);
- b. [Commission on Human Rights in South Sudan](#) (2016);
- c. [Group of Eminent Experts on Yemen](#) (2017);
- d. [Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL](#); (2017) and
- e. [Independent Investigative Mechanism for Myanmar](#) (IIMM) (2018);
- f. [Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela](#) (2019);
- g. [Independent Fact-Finding Mission on Libya](#) (2020);
- h. [United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel](#) (2021);
- i. [International Commission of Human Rights Experts on Ethiopia](#) (2021);
- j. [Independent International Commission of Inquiry on Ukraine](#) (2022); and
- k. [Group of Human Rights Experts on Nicaragua](#) (2022).

Additionally, the Human Rights Council has also allocated OHCHR three “accountability projects”, namely the:

- a. [Democratic People’s Republic of Korea accountability project](#) (2014);
- b. [OHCHR examination of the human rights situation in Belarus](#) (2021); and
- c. [OHCHR Sri Lanka accountability project](#) (2021).

Finally, there are also investigations and fact-finding missions conducted by the numerous thematic and country-specific [Special Procedures mechanisms](#) established by the Human Rights Council, and the inquiry procedures conducted by [UN human rights treaty bodies](#).

5. Accountability Mandates cover a spectrum

For the purposes of this Paper, the ICJ refers to all UN-mandated investigations with one or more accountability functions as “Accountability Mandates” that exist together on a spectrum.

UN-mandated investigations have been broadly categorized as being of two types:

- a. UN investigative mechanisms tasked with sophisticated forms of evidence gathering (IIIM, UNITAD and the IIMM); and
- b. UN human rights investigations (all other UN mandated investigations).

There has been a misperception that only the former mechanisms carry out criminal investigations into individual criminal responsibility, whereas the latter only monitor, document, report and make recommendations on human rights violations.

However, the ICJ considers this categorization of UN-mandated investigations does not reflect reality. Rather, it is more accurate to think of all UN-mandated investigations with at least one accountability function as belonging to the same family and existing on a spectrum, with mandates that weigh more towards traditional human rights investigations and reporting at one end, and UN investigative mechanisms that focus essentially on establishing the

evidentiary basis for criminal prosecutions at the other. While in the middle of the spectrum – where most of the Human Rights Council-created Accountability Mandates now operate – there are increasingly sophisticated “*blended*,” or “*mixed*” mandates requiring both human rights and criminal investigative capacity. All these Accountability Mandates address, to some extent, aspects of both State responsibility and individual criminal responsibility but use at least some different working methodologies in the gathering of information and evidence.

The ICJ further considers this dual classification scheme has been unhelpful in addressing many of the challenges identified later in the Paper, particularly regarding the resources and staffing that have been allocated to the various Accountability Mandates. Particularly problematic is the belief that those mandates that are perceived to fall into category b. do not need the same resources and specialist staffing that is required by those mandates in category a., notwithstanding the real requirements of their increasingly complex mandates.

The clearest example is the recently created [Independent International Commission of Inquiry on Ukraine](#), whose expansive mandate appears to have borrowed from the mandates of Accountability Mandates at both ends of the spectrum.

The blending of functions has been deliberate for a variety of reasons. UN bodies often act with regard to situations where there are strong allegations of human rights or international humanitarian law violations constituting crimes under international law that warrant an investigation into individual criminal responsibility, particularly where ongoing widespread or systematic violations of human rights and/or international humanitarian law are being committed, and States are unable or unwilling to undertake investigations that meet international law and standards.

Other major factors dictating the design of Accountability Mandates – and the emergence of increasingly mixed mandates – are the powers and political dynamics of the various UN bodies establishing them. These relate predominantly to the UN Human Rights Council, but also the UN Security Council and the UN General Assembly.

For example, a senior diplomat the ICJ spoke to acknowledged that in crafting the mandate of one of the more recent mandates before the UN Human Rights Council (that was not the IIIM or IIMM) their aim was to create an “*IIIM/IIMM-Lite*.” They hoped that by not seeking the creation of a new investigative mechanism *per se*, but by giving it some IIIM/IIMM-like functions, the same effect would be achieved while making it more likely the resolution would pass the political hurdles at the Human Rights Council.

6. Opportunities and challenges faced by Accountability Mandates

There is broad consensus among stakeholders that Accountability Mandates contribute significantly towards individual criminal responsibility for serious human rights violations – as well as State responsibility – and form an integral part of the human rights and international criminal justice architecture.

However, nearly all Accountability Mandates have faced significant (and similar) challenges. In the ICJ’s report “*The Future of Accountability Mechanisms: Twenty Recommendations*” and in the recent report “[Anchoring Accountability for Mass Atrocities](#)” produced by Oxford last month, the opportunities and challenges faced by Accountability Mandates are set out in detail.

In short, Accountability Mandates, whether mixed or essentially focused on individual criminal responsibility, contribute toward accountability by carrying out investigations where an accountability gap exists, by:

- a. identifying perpetrators;
- b. collecting and preserving evidence for use in national, regional and international legal proceedings, including for use in non-criminal judicial and non-judicial proceedings

- aimed at providing victims with effective remedies and reparation for violations, before it is lost, destroyed or deteriorates;
- c. monitoring and documenting violations and making recommendations to States and other actors on how to protect and remedy human rights, in the case of those Accountability Mandates with mixed mandates; and
 - d. having a deterrent effect against future violations.

However, the ICJ and Oxford have found that nearly all Accountability Mandates face common challenges each time a new one is established, including:

- a. **Political challenges** inside the UN Human Rights Council or other UN bodies to establish or renew a mandate, often against hurdles unrelated to merit;
- b. **Financial challenges**, including at the budget allocation stage;
- c. **Administrative challenges**, relating to the start-up phase of operations, including the need to secure appropriate staffing with the right substantive expertise and resources to adequately fulfill the mandate; and
- d. **System challenges**, to record, store, analyze and preserve massive amounts of digital evidence securely, and the need to develop policies, procedures and protocols to ensure the Accountability Mandates fulfil their functions effectively, efficiently and without doing harm to victims and witnesses.

At a recent public panel convened by Oxford in Geneva on 18 May 2022, Pablo de Greiff, a Member of the Independent International Commission of Inquiry on Ukraine – which has one of the most expansive mandates of all – indicated that: “[T]his mandate is a perfect reflection of the emerging tendencies and expansionistic tendencies... and I don’t think those expansionistic tendencies in terms of function have been accompanied by a similar expansion in terms of competencies and certainly not in terms of budgeting or staffing...” In other words, the [mandate](#) requires it to *inter alia* fulfill a similar function to the IIMM and IIIM:

To collect, consolidate and analyze evidence of such violations and abuses [alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation], including their gender dimension, and to systematically record and preserve all information, documentation and evidence, including interviews, witness testimony and forensic material, consistent with international law standards, in view of any future legal proceedings

At the same time, appropriate staffing and resources had not yet been made available. At the time of the statement, approximately 20 staff were being considered, including support staff. Considering this, at the same event, Pablo de Greiff added that “...the idea that we will be able to satisfy the mandate as it is drafted in a serious way is completely unrealistic.”

One reason is simply that human rights investigations are usually only carried out to low “reason to believe” evidential standard. On the other hand, an essentially criminal investigation needs to be conducted to a higher standard requiring a much more rigorous approach to, for example, proving elements of crimes and establishing chain of custody, all of which require specialist staffing, support and infrastructure.

Another example are the challenges faced by the Independent Fact-Finding Mission on Libya. In its case, nine months passed before it could commence its investigation. Reporting to the Human Rights Council on 5 October 2020, the Chairperson [said](#):

As we begin our work, we do so within the context of many operational challenges. The concept of operations, prepared by the Office of the High Commissioner for Human Rights, foresees a full Secretariat to support the FFM in the implementation of its mandate, consistent with the established practice for investigative bodies. Our work should be facilitated by a range of specialised expertise, including forensics, military affairs, gender and child rights and Arabic-speaking interpreters, and was to be operationalised from August 2020. However, the establishment of the Secretariat has

been delayed due to the UN Regular Budget liquidity crisis and the related recruitment freeze.

Challenges also arise when an Accountability Mandate shutters, including regarding the storage and preservation of evidence and information and the ongoing need for engagement with judicial and prosecutorial authorities at the national, regional and international levels. These challenges can be particularly acute when a mandate concludes suddenly as was the case when, in October 2021, the Human Rights Council voted down a [resolution to renew the mandate](#) of the Group of Eminent Experts on Yemen, to the surprise of many observers.

7. Need for a Standing Independent Investigative Mechanism or similar

For these reasons, there is general consensus that while the various Accountability Mandates fulfill an important role in the human rights and international criminal justice architecture, taken as whole there is a need for improving the process of their establishment and operation. These improvements aim at strengthening the benefits presented by Accountability Mandates and overcoming the challenges.

The studies carried out by the ICJ and Oxford both concluded independently that the best way to bolster benefits and minimize challenges is to establish a SIIM or similar mechanism.

Importantly, the idea is *not* to impose substantial additional costs to the existing resources allocated to the creation of Accountability Mandates, but rather to make the system more efficient and cost-effective overall by allocating resources in a different way, namely providing for a standing capacity that could take on investigations referred to a SIIM and, in addition, support the work of other Accountability Mandates. The aim would be to create an economy of scale, rather than creating a new operational structure with all the attendant resources every time a new situation arises.

Further, a SIIM or similar would not compete with or frustrate the existing international human rights and criminal justice architecture, including the ICC, but would rather support and complement it. Nor would it obviate the need for fact-finding missions and commissions of inquiry to be created in appropriate cases. Rather, it should be complementary to their work.

A SIIM would support the work of the ICC in several key ways, including by – to the same standards:

- carrying out a prompt and effective investigation into a situation in circumstances where the Rome Statute has not been ratified and the UN Security Council has not referred the situation to the ICC;
- conducting a prompt and effective, “*advance*,” investigation into a situation before the ICC is able to become operational, which may also assist with any preliminary examination; and
- being a “*force multiplier*” to an ICC investigation through cooperation in the same way the resolution creating the IIMM requested it to “*cooperate closely*” with the ICC.

8. Questions and Answers

1. What might a SIIM look like in general terms?

In order of preference:

Option 1: Establish a SIIM

The ICJ considers that the establishment of a SIIM would address many of the challenges faced by Accountability Mandates, leading to greater effectiveness and efficiencies.

A SIIM should be independent of OHCHR and other UN Agencies but linked to them in a consultative and operational capacity - and reliant on them for certain services - in the same way as the IIM, IIMM and UNITAD. It would have two functions:

- conduct investigations with a view to gathering information and evidence for potential use in criminal and other legal and administrative proceedings; and
- use its capacity to act as a specialist service provider to existing and future UN body-created Accountability Mandates, including relevant fact-finding missions and commissions of inquiry.

Investigation function

The SIIM would conduct its own investigations when its mandate is triggered (see Question 4).

A SIIM would need to put in place the specialized capacity required for when an investigation is warranted into individual criminal responsibility, for example:

- a. digital technology infrastructure and expertise;
- b. witness and victim protection infrastructure and expertise; and
- c. dedicated expertise on international criminal law, forensics and military structures.

This capacity is already in place to varying degrees inside the IIM, IIMM and UNITAD. A particular area that requires specific resources is "*digitization*", as the capacity to manage digital data and evidence is one of the biggest challenges facing all Accountability Mandates, demanding experience with existing systems as well as capacity to provide customized solutions.

Once collected and preserved, the material could also be appropriate for use in other legal proceedings before human rights courts, truth commissions, and civil and administrative proceedings.

A SIIM should also have a core group of investigators, analysts, and lawyers, including with thematic expertise in areas such as crimes against or involving children and conflict-related sexual violence. This would help in creating consistency and standing expertise and avoiding duplication and double standards. It would also address the delays observed under the current system of recruiting and establishing a new team for each new situation. Additional staff could be recruited on an as-needed basis, for example language and country specialists. This would enable a SIIM to be operational on a new situation promptly and more effectively and efficiently than the current system of creating a new Accountability Mandate each time a new situation arises.

Given that a SIIM may end up carrying out several investigations in parallel, "*firewalls*" should be put in place to ensure that risks attached to one investigation do not infect the other investigations it may be carrying out.

Importantly, a SIIM should “*support*” the so-called “*hard justice*” structure, including the ICC, and not “*weaken*” it. There should be a requirement that it operates in the same manner as, say, the IIMM - which has an explicit mandate to “*cooperate closely*” with the ICC - either when an ICC investigation takes place in parallel or in the future.

In the latter case, the SIIM may be able to conduct an “*advance*” investigation, gathering and preserving evidence to the same standard as the ICC, which the ICC would be able to use if its own mandate was triggered in addition to the mandate of the SIIM. As appropriate, the SIIM would share evidence with the ICC, national jurisdictions, and other legal proceedings (see question 5), which may wish to access its repository of evidence. This would gain effectiveness and efficiency across the international justice system overall. In other words, the SIIM should act as a “*force multiplier*” alongside the ICC and other bodies in the international human rights and criminal justice architecture. At the same time, caution should be exercised not to be overly duplicative of other investigations which may be underway, including by the ICC. This should be considered on a case-by-case basis.

One of the benefits of a SIIM would be that it would obviate the need for victims to advocate with States for various functions to be included each time a new Accountability Mandate is proposed, some of which may not be feasible in a particular political climate. For instance, it might not always be possible for a mandate to include the “*collection, consolidation and preservation of evidence for use in future legal proceedings.*” This would also mitigate against the challenge of “*selectivity*” where some Accountability Mandates get “*stronger*” mandates than others, much to the puzzlement and frustration of victims.

Specialist service provider function

This function would allow the deployment of some of the SIIM’s specialized capacity, focussed essentially on criminal investigations, as set out above, to other Accountability Mandates such as fact-finding missions and commissions of inquiry, and UN Special Procedure and treaty body support, upon a request for specialist assistance.

In fact, it was pointed out that those Accountability Mandates with mixed mandates of both human rights and individual criminal responsibility functions have an even “*higher load*” of evidence to process, nearly all digital, that needs to be collected, preserved, and analysed – than even a traditional international criminal law investigation. They therefore nearly all require greater support across the board.

This is because they may need to investigate not only individual criminal responsibility but also issues related to civil liability, establishment of a record for truth commissions and similar bodies, the root causes of a conflict and justice sector or legislative reform. The budgets of Accountability Mandates are almost always insufficient to carry out all these tasks properly.

Other advantages

A SIIM using this structure would also have other advantages, such as acting as a centralized source of evidence when multiple actors are investigating the same situation, including States, the ICC, National Human Rights Institutions, and civil society organizations. At the same time, it could maintain a “*birds-eye view*” over the situation more generally mapping who is investigating what and what their needs are. These roles are particularly important as the documentation and investigation efforts of situations becomes more complex requiring greater support and coordination, as seen in Syria, Myanmar, Ukraine and elsewhere.

A SIIM would also have the advantage of being able to maintain a centralized, enduring, repository/archive of evidence that would maintain a record of the contact details of evidence providers, and the detail of any consent they provided or other conditions, which can be a challenge the longer the period between the provision of the evidence and the opportunity for it to be shared for use in legal proceedings.

A SIIM should also have the function of proactively engaging with States and other actors at the national, regional and international levels seeking avenues for accountability to be opened up.

Option 2: Establish an independent, investigation support service provider

This option would entail the establishment a stand-alone, independent, investigation support service provider, independent of OHCHR and other UN Agencies, but linked to them and reliant on them for certain services.

Unlike a SIIM envisioned by Option 1, such a model would *not* conduct its own investigations. Rather, it would simply establish a standing specialized capacity that could be drawn upon when an expert, essentially criminal, or other complex investigation is undertaken by existing and future Accountability Mandates such as fact-finding missions and commissions of inquiry, and UN Special Procedure and treaty body support, upon a request for specialist assistance. For example, it could provide support and services such as those listed above (specialized digital storage capacity and expertise, witness and victim protection infrastructure and expertise, expertise on forensics and military matters, and expertise in international criminal law, including on conflict-related sexual violence).

Its independence should allow for greater nimbleness in responding to the needs of those requesting support as it would not be subject to the bureaucratic constraints that all UN agencies face.

However, by not having the authority to conduct its own investigations, it would not avoid the political cost, including the challenge of "*selectivity*," in establishing when, how and what the mandate of a new Accountability Mandate should look like. It would also incur many of the same costs of Option 1 without many of the benefits, as Accountability Mandates would still need to be created for every appropriate situation and, where they are given blended mandates, would have to carry out their own investigations (*albeit* with greater support), for example.

While this Option may be a self-standing body, another possibility could be to establish a standing investigation support service provider *inside* the OHCHR. The OHCHR already supports many independent bodies/mandates – including special rapporteurs, treaty bodies and Accountability Mandates for certain services and there are certain clear advantages to placing a new provider under an already existing human rights agency like the OHCHR. However, such an arrangement would also likely impose encumbrances for both for the standing investigation service provider and for the OHCHR itself. This is because a standing investigation support service provider must have the capacity to support essentially criminal and other complex investigations into legal liability. This is a narrower and more focused set of services than what the OHCHR's mandate traditionally encompasses, including monitoring and documenting human rights violations. It may also be more vulnerable to the bureaucratic constraints that all UN agencies face. If the standing investigation support service provider were to come under the OHCHR, it would have to be a functionally autonomous specialized unit, though many of the support services could be shared.

What is clear, however, is that the OHCHR requires greater, ongoing, support (both political and financial), more generally.

To avoid either Option 1 or 2 facing the same challenges most Accountability Mandates have experienced, particularly during the start-up phase, consideration could also be given to, at least during inception, scaling up some of the existing support services within the capacity of the IIIM and IIMM to provide support to either Option without weakening the ongoing level of support required by the IIMM and IIIM.

2. Should a SIIM replace existing and/or future Accountability Mandates? And if not, how would a SIIM support their work? How can we gain efficiency?

The SIIM envisioned under Option 1 would not replace existing Accountability Mandates. It may, however, obviate the need for new Accountability Mandates to be created in certain instances. This would be, for example, when a situation arises that the triggering mechanism (see question 4), considers would best be referred to the SIIM when certain criteria have been met (see question 7). However, Accountability Mandates like fact finding missions and commissions of inquiry would continue to be created in parallel to (and most often, before) a SIIM was triggered when no such recommendation was made. In other words, the SIIM would itself exist on the spectrum of Accountability Mandates at the same end as the IIIM, IIMM and UNITAD.

Efficiency and cost-effectiveness would be gained through the fact the SIIM would have a standing capacity of staff, support and other services. This would enable it to become operational in response to a new situation in a timely fashion, without the need for a full, new, start-up phase with all the attendant costs and other challenges faced by new mandates. Efficiency and cost-effectiveness would also be gained through the specialist service provider function of the SIIM, in that it would also deploy its standing support services to other Accountability Mandates as and when requested. This could be where special challenges arise, like support for complex investigations, including into conflict-related sexual violence or crimes against or involving children.

The ongoing creation of Accountability Mandates for situations that do not warrant referral to the SIIM is desirable for a number of reasons, including that they will continue to play a critical role in traditional human rights investigations and reporting; and that the injection of new leadership and staff into the Accountability Mandate system, particularly those with special country or region-specific experience, is desirable to ensure the system overall continues to grow and innovate – guaranteeing against “capture” or “stagnation.”

Of course, if Option 2 was chosen, it would exist only to provide specialized support services to existing and future Accountability Mandates that would continue to be created.

3. Which international authority should establish and activate a SIIM or Investigation Support Service Provider?

The endorsement – and therefore backing – by a UN Body has “*been key*” for the effective functioning of existing Accountability Mandates.

Therefore Option 1 or Option 2 should be established and activated by either one or both of the following UN bodies:

- a. The UN Human Rights Council, possibly with the endorsement by the UN General Assembly; and/or
- b. The UN General Assembly.

The Human Rights Council has generated most of the existing Accountability Mandates and remains best placed to do so by reason of its organic mandate and operational culture. It remains most inclusive of the broadest range of stakeholders in its consultative processes, including with National Human Rights Institutions and NGOs. The UN General Assembly could also serve to establish the mandate, in situations where the UN Human Rights Council has not itself acted.

The UN Security Council can already refer a situation to the ICC or demand further investigation. Further, Accountability Mandates have often been established in situations where the UN Security Council cannot agree on such a response or when one of the Permanent Five members have misused the *veto* power to block accountability initiatives on grounds which are

sometimes unprincipled. In such a case, the body is likely to be too politicized to establish or activate Option 1 or Option 2. Its limited membership also gives rise to additional legitimacy considerations.

If an investigation support service provider is created within OHCHR, an alternative under Option 2 set out above, it may not have to be created by a UN body, but this would require further exploration.

4. How would an investigation by a SIIM be triggered?

An investigation by a SIIM created under Option 1 should be triggered on principled and established criteria (the issue does not arise under Option 2).

The "*politicization*" of UN bodies in determining when an Accountability Mandate should be created and what its mandate should look like – leading to "*selectivity*" - should be taken into account to the maximum extent in determining what the triggering process should look like. "*Legitimacy*" should be the guiding principle.

As such, the issue of "*triggering*" should be "*de-coupled*" from the issue of how a SIIM is established (Question 3), with the former being carried out, ideally, by an independent authority.

Therefore, a referral to a SIIM should be made by one of the following methods, with both being possible avenues:

- a. By an independent authority such as a specialized, collective, and "*collegial*" panel made up of recognized experts in the field and with cross-regional representation tasked with monitoring situations; and/or
- b. By intergovernmental bodies such as the UN Human Rights Council, UN General Assembly or UN Security Council (however, neither the UN General Assembly nor the Security Council should have exclusive competency in this regard - it would be important that the UN Human Rights Council, as the premiere human rights authority, be given at least concurrent competence).

In both cases, referrals could be made upon the recommendation of an existing Accountability Mandate, the High Commissioner for Human Rights, UN Special Procedures, or other Independent UN Experts.

5. With whom should a SIIM exchange information and evidence and how can we best ensure that after evidence has been collected it will be used in legal proceedings?

A SIIM created under Option 1 should share evidence with a broad range of actors, in appropriate cases (the issue does not arise in the context of Option 2). However, it is best to not create a too rigid set of criteria that anticipates every possible scenario in advance.

Ideally, this issue should be left to the discretion of the triggering mechanism, on a case-by-case basis (see question 4) and the SIIM itself, as they are best placed to weigh the various concerns set out below.

However, certain principles should be considered, namely:

- a. when sharing with States, there needs to be certain "*due process*" baselines, including fair trial rights guarantees in place – and assurances that the evidence would not be used in cases which persons subject to investigation would be at real risk of serious human rights violations, including the death penalty;

- b. information should not be shared with authorities where there is a real risk that they will be used for improper, corrupt, or politically motivated purposes, rather than legitimate justice purposes in accordance with international law and standards;
- c. proceedings in which evidence may be used should not be limited to criminal proceedings but also legal proceedings more generally (which is how the IIIM and IIMM have interpreted their mandates) – these may include sanctions proceedings where there is a nexus to the crimes under investigation or proceedings before the International Court of Justice; and
- d. a process for sharing evidence within the UN system should also be left open, for example with the OHCHR, UN Special Procedures and Independent Experts, where appropriate, in compliance with the requirement to be obtained with the informed consent of the source, and at the discretion of the SIIM.

Regarding d. by way of illustration, the IIMM possesses a large amount of evidence that could be used by the UN Special Rapporteur on Myanmar, but currently, there is no formal basis on which to share it as, according to its mandate, the IIMM may only share information with “national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes.”

In all cases, the free and informed consent of evidence providers and any other conditions must be respected and carefully recorded. In addition to consent, there always must be an independent assessment made regarding any security risks to evidence providers that could arise. This has been particularly important in cases where the opportunity for the evidence to be shared arises years after the evidence was obtained. One advantage of the SIIM anticipated in Option 1 is that this kind of record-keeping over time would be more effective given its standing nature, as mentioned earlier. For example, a challenge that has arisen in the past is when opportunities to share evidence presented themselves after an Accountability Mandate’s operations had come to an end, making the effective tracking of evidence providers, their wishes and any other conditions especially difficult.

The free and informed consent of evidence providers should not be the only consideration but also whether by sharing information with someone requesting it, no harm would be done to the evidence provider. Another is the question of the onward sharing of evidence by those with whom evidence is shared, including under various formal obligations such as the principle of complementarity - and whether there are any concerns in that regard once the SIIM has “lost control” of the shared evidence.

Regarding the question, how could a SIIM best ensure that after evidence has been collected it will be used in legal proceedings, the mandate of a SIIM created under Option 1 should include the possibility of, in appropriate cases, proactively seeking out appropriate *fora* for evidence to be utilized, as set out above.

6. Should a SIIM perform a reporting function in addition to the collection and sharing of evidence?

A SIIM created under Option 1 would not, and should not, infringe on the necessary and traditional role of UN mandated investigations such as fact-finding missions and commissions of inquiry in investigating state responsibility, including for example identifying root causes to a conflict and making periodic reports to UN bodies with recommendations (the question does not arise under Option 2). As such, the traditional “reporting function” of UN mandated investigations should continue unimpeded.

However, it is sometimes considered that a requirement to carry out periodic human rights reporting may prejudice or otherwise complicate an investigation into essentially individual criminal responsibility, where one mandate is tasked with carrying out both. This is because those conducting a criminal investigation do not want to “get ahead of the evidence” in their conclusions, compromise the integrity of an ongoing investigation by revealing information that may be used to harm the investigation in some way including through the destruction of

evidence or the disappearance of suspects, make evidence more susceptible to attack at the trial stage, or jeopardise the safety and security of witnesses and victims. Concerns sometimes also exist in the other direction, that the fact a criminal investigation is being carried out may cause stakeholders wary of providing an Accountability Mandate with information relevant to human rights reporting. Although it has been said the opposite is also sometimes true, the criminal investigation may, in some circumstances, encourage cooperation as the mandate is perceived to have a “*tangible*” objective.

Reporting can also take different forms. From merely reporting on “*activities*,” often interpreted broadly (but usually focussed on administrative and operational progress, which all Accountability Mandates do), to just describing, objectively, what has happened in a country as a situation develops, to characterizing those facts as certain kinds of violations, to making fulsome recommendations on what States need to do to fulfil their international human rights obligations.

Current Accountability Mandates take different approaches. At one end of the accountability mandate spectrum, many Accountability Mandates have blended mandates, tasked with carrying out periodic human rights reporting and conducting investigations into individual criminal responsibility. At the other end of the spectrum, the IIMM and IIIM essentially conduct investigations into individual criminal responsibility and do not report on specific situations or cases in detail but do report on their “*activities*.”

Notably, in the case of IIMM, victims and their representatives have argued, however, that a “*reporting gap*” was left when the Fact-Finding Mission on Myanmar ended as the IIMM became operational without the same periodic reporting mandate. The question has been asked, who is now monitoring and reporting on the many recommendations the fact-finding mission made before its mandate ended? By contrast, the Syria situation has both the IIIM and the Independent International Commission of Inquiry on the Syrian Arab Republic operating in parallel, which is considered to have worked well as the Commission takes the public reporting role, allowing the IIIM to carry out its investigation with “*discretion*”.

The question then becomes, should the SIIM carry out a public reporting function in addition to conducting investigations into essentially individual criminal responsibility. There are three possibilities:

- a. the question be left to the discretion of the triggering mechanism, on a case-by-case basis (see question 4); and/or
- b. include a human rights reporting function, in addition to a mandate to conduct investigations into essentially individual criminal responsibility and leave it to the SIIM to decide how to coordinate the two functions without compromising the integrity of either; or
- c. do not give the SIIM a human rights public reporting function but ensure that a UN mandated investigation always works in parallel on the relevant situation which would fulfill this function, in the same manner as the Syria situation.

7. For what kind of cases of human rights or international humanitarian law and international criminal law violations should the SIIM gather evidence?

A SIIM created under Option 1 (the question does not arise for Option 2) should focus primarily on situations where crimes under international law are alleged to have been committed and where, therefore, an investigation into essentially individual criminal responsibility is warranted.

Limiting a SIIM’s “*subject-matter jurisdiction*” to only those crimes listed in the ICC’s Rome Statue is too narrow. On the other hand, it would not be desirable or practicable to trigger a

SIIM's mandate whenever any crimes under international law¹ are committed inside a State, so a certain threshold of crimes under international law is probably required. Indeed, there is virtually no State that is entirely free of such crimes, as even a single case of torture or unlawful killing is a crime under international law. Therefore, a trigger should include where there are *indicia* that the crimes have been committed on a widespread or systematic scale or where they reach a certain threshold of gravity, for example an act or planned act of genocide or a political assassination.

However, it was emphasized that there may be circumstances where other related crimes such as corruption or the use of prohibited weapons should also be investigated. Limiting an investigation to crimes under international law may also be too narrow, and the qualifier "*and related crimes*" should be added, as is the case with the mandate of the Commission of Human Rights in South Sudan, for example. This has the added benefit of increasing the chances that the evidence that is collected could be used in proceedings at the domestic and regional levels, in circumstances where some crimes under international law are not criminalized, enlarging the opportunities for victims to obtain justice, remedies and reparations.

Having said this, it is not preferable to define too specifically what a SIIM's subject matter jurisdiction should be, but rather delineate some broad parameters and then leave it to the discretion of the triggering body (see question 4).

Therefore, in order of preference, the subject matter jurisdiction of a SIIM should:

- a. be left to the discretion of the triggering mechanism, on a case-by-case basis (see question 4), but with some operational guidance as to criterion they should consider when deciding on such a referral; and/or
- b. be limited to crimes under international law and related crimes committed on a widespread or systematic scale or reaching a certain level of gravity.

8. What rules of evidence should a SIIM apply to enable the ICC or other tribunals and national courts to use them?

Considering the experience of existing Accountability Mandates, there is no easy answer to the question of how a SIIM created under Option 1 should gather evidence in circumstances where it is not always known in advance how and where it will be used in the future (the question does not arise under Option 2).

However, evidence – including the wording of the oath in witness statements – should be recorded and gathered in a way that is most likely to be admissible – or useful as background or lead evidence – in all possible legal settings. These may include before inquisitorial, adversarial, hybrid and international *fora* such as the ICC and ICJ, as is generally the current practice. In line with the discussion above, some Accountability Mandates will also be gathering information for purposes other than a criminal trial, such as civil and administrative proceedings, truth commissions, and general human rights monitoring and reporting. There may need to be a separate set of criteria established for such purposes.

9. How can States be convinced of working together with the SIIM?

Seeking and obtaining the cooperation of States in which violations have been committed and third States remains a challenge for most Accountability Mechanisms. There is no way to "*force*" cooperation, in the same way universal ratification of the Rome Statute is yet to be

¹ Crimes under international law cover serious human rights or international humanitarian law violations including, at a minimum, aggression, war crimes, crimes against humanity, genocide, slavery, torture, enforced disappearances, and extra-judicial killings.

realized, however a SIIM created under Option 1 could adopt certain strategies (the issue does not arise under Option 2):

- a. encourage States, through dialogue, to pass legislation that allows for cooperation with Accountability Mandates;
- b. use the public reporting on activities that all Accountability Mandates conduct as an opportunity to name States and put pressure on them to cooperate;
- c. establish formal cooperation agreements, including with "*judicial and other relevant bodies*;"
- d. provide a SIIM with the power to proactively seek out opportunities for accountability proceedings with States and other actors at the national, regional and international levels, as mentioned above; and
- e. continue the current practice of engaging with all UN Member States when a new Accountability Mandate commences operations requesting any information relevant to its mandate.

10. What is the necessary budget for a SIIM or investigation support service provider, including for a permanent archive of evidence?

The budget for a SIIM created under Option 1 should consider both its functions, which would require two different budget lines that would be greater overall than say a budget for Option 2, which plays only a support function and does not carry out its own investigations. Critical is that a budget be allocated that is sufficient to allow the efficient and effective functioning of the mandates of either Option 1 or Option 2.

Both Options should be funded by the regular UN budget but also maintain the option of receiving additional voluntary contributions.

Funding should consider, explicitly, the need for an enduring archive that would store evidence and track issues of consent and other conditions attached to evidence that was shared with the SIIM anticipated by Option 1.

Any budget should also take into account where the office(s) of Option 1 would be located. Importantly, consideration should be given to establishing offices closer to relevant situations and victims, where appropriate and possible.

A SIIM anticipated by Option 1 should have a Head at the Assistant-Secretary General (ASG) level with a direct reporting line to the UN Secretary General with appropriate deputies and sufficient senior staff.

Annex

Members of the Group of Experts

1	Radhya Al-Mutawakel	Yemen human rights defender
2	Omar Alshogre	Syria human rights defender
3	Philip Alston	NYU School of Law
4	Cecile Aptel	Tufts University
5	Sareta Ashraph	Oxford University
6	Carlos Ayala	Vice-President of the ICJ
7	Reed Brody	ICJ Commissioner
8	Radhika Coomaraswamy	Former Chairperson of the Sri Lankan Human Rights Commission & other UN roles
9	Federica D'Alessandra	Oxford Programme on International Peace and Security Blavatnik School of Government
10	Mazen Darwish	ICJ Commissioner
11	Joern Eiermann	UNITAD
12	Sarah Knuckey	Columbia Law School
13	Nicholas Koumjian	Head of the IIIM
14	Claus Kreß	University of Cologne
15	Thilo Marauhn	President of the International Humanitarian Fact-Finding Commission (IHFFC)
16	Catherine Marchi-Uhel	Head of the IIIM
17	Khin Ohmar	Myanmar human rights defender
18	Amb. Stephen Rapp	Oxford Programme on International Peace and Security; Blavatnik School of Government
19	Hugo Relva	Amnesty International
20	Andrea Santacruz	Venezuela human rights defender
21	Ian Seiderman	ICJ Legal and Policy Director
22	Kirsty Sutherland	Oxford University
23	Marta Valiñas	Chair of the Independent International Fact-Finding Mission on Venezuela
24	Sam Zarifi	ICJ Secretary General

Other participants

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2	Andrew Clapham	Graduate Institute of International and Development Studies in Geneva

*Staff of the ICJ and some Accountability Mandates also joined the consultations at different times to observe and provide input on specific issues.

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