

Independent Study - Observatory in Support of the Global Fight Against Impunity

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INTRODUCTION

This Study was commissioned by the European Commission (INTPA) with, according to the TORs, the overall objective “to produce an analysis of the current situation of the fight against impunity, its gaps and needs for strengthening. Explore, outline, and assess the options for activities and scope of focus of a potential support to an Impunity Observatory, which would contribute to combatting impunity globally.” The study should always be read in conjunction with the TORs which explains the focus and objectives of the exercise.

The study is based on extensive desk research and a broad interview process with various stakeholders, such as EU officials, EU Member States, UN institutions and civil society, including victims groups. When it comes to EU MS further and more comprehensive consultations are advisable. Given the time and resources available this study can only present first ideas and thoughts on the mandate and governance structure of a possible future EU supported Observatory to combat impunity. More detailed work needs to follow to verify and move forward some of the suggestions and ideas presented in this study. Further consultations, including with civil society, would be beneficial to garner support around the idea of an Observatory. In short, more time is recommended to get it right. It is, nonetheless, hoped that this study will provide a useful navigation tool in the complex endeavour to establish an Observatory that can make a difference on the ground in the fight against impunity.

The study is divided in 2 parts. A first part will look into the foundations of the fight against impunity and highlight key challenges the fight is currently faced with. The study seeks to be analytical and takes a birds-eye perspective when it comes to the challenges in order to assist objective and informed decision making. The second part of the study will try to zoom in on what questions need to be considered when thinking about the establishment of an Observatory, such as its scope, functions and governance structure. At the end of the study, suggestions for the way forward are presented. The annex includes a list of EU external actors that have been interviewed for this study (Annex 1). Annex 2 gives an overview of comparative examples of other networks/consortia, their activities and governance structure which could help as an inspiration tool when thinking about the governance structure of a future Observatory. Annex 3 seeks to provide some legal definitions concerning the scope of the anti-

impunity framework. In annex 4 the TORs for the study are recalled. Annex 5 provides the sets of questions used in the interview process.

PART I - FOUNDATIONS AND CHALLENGES IN THE FIGHT AGAINST IMPUNITY

Part I should assist in laying the substantive and practical ground for the discussion on the establishment of an Observatory that supports the fight against impunity. It will do so by showing where the fight against impunity is coming from, what its key components are and how it has developed over time ('Origins and Foundations'). In a second step it will give an outlook by looking at some of the gaps, criticism and challenges and how they could be overcome ('Gaps and Challenges'). Part I will provide a brief mapping looking into the work of actors that work on combating impunity, where they have focused their work and projects ('Mapping'). Part I should provide the navigation tool to address the question of what a good and workable option for an Observatory could be. Rather than a simple endorsement of the fight against impunity this study is intended as a multifaceted critical reflection about what 'fight against impunity' means and involves, as well as about the problems and concerns to which it may give rise. It is hoped that this critical reflection will contribute to the discussion and provide some impetus for the important work of the EU in an ever-changing landscape in the fight against impunity for serious human rights violations. The Study "State of Play" (2020) by the European Parliament should be read in conjunction with this report in order to get a comprehensive picture of the issues around the fight against impunity, including its legal foundations.¹

ORIGINS AND FOUNDATIONS OF THE FIGHT AGAINST IMPUNITY

DEFINITION AND SCOPE

We live, it has been said, in an 'age of accountability.'² Although an over-simplification, there is some truth in this formulation. In our 21st-century world, 'holding perpetrators accountable' and 'ending a culture of impunity' have become central rallying cries for human rights movements across the globe. The battle against impunity has indeed become 'one of the unique ethical

¹ Available at [https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2020\)603499](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2020)603499)

² K. Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability,' in F. Lessa and L. A. Payne (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012), 19–41.

signatures of our time.³ It was not always so, however. Originally concerned with naming and shaming abusive governments, human rights activists did not engage with the issue of impunity until the mid-1980s.⁴ The turn to accountability in human rights was therefore not a linear process, but rather a ‘dramatic and transformative event’ shaped by the special circumstances of the time.⁵

The rise of a global anti-impunity discourse can be traced back to what has been called the ‘long decade’ of the 1990s, spanning from the formal end of the Cold War (1989/1991) to 2005.⁶ This period saw the outbreak of genocidal violence and mass atrocity in many parts of the world, including Rwanda and the former Yugoslavia, but it also witnessed a remarkable number of new international interventions, initiatives, norms and institutions, each dedicated to fighting the spectre of impunity. At the forefront of these moves was the turn to criminalization as an avenue for human rights enforcement. High-profile trials of former heads of state, including Augusto Pinochet and Slobodan Milošević, testified to a new global trend in world politics towards holding individual state officials criminally accountable for human rights violations.⁷ But the ‘long’ decade saw also a global spread of alternative or complementary accountability ‘mechanisms’, notably truth commissions and reparations programmes, directed at addressing legacies of impunity and pursuing transitional justice.⁸ This more holistic understanding of accountability was particularly linked to a focus on local experiences often led by victims’

³ S. Moyn, ‘Anti-Impunity as Deflection of Argument,’ in K. Engle, Z. Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Oxford: Oxford University Press, 2016), 68-94, at 68.

⁴ See P. Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,’ *Human Rights Quarterly* 31 (2009) 321-367, at 334.

⁵ Moyn, *supra* n 2, at 69.

⁶ J. H. Quataert, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (Philadelphia; University of Pennsylvania Press, 2009), at 16-17.

⁷ For a prominent analysis of this phenomenon, see K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011).

⁸ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN doc. E/CN.4/2005/102/Add.1 (8 February 2005); Basic Principles and Guidelines on the Right

perspectives and their needs and aspirations. The holistic understanding is reflected in UN principles,⁹ but also in recent policy frameworks of the AU and EU on the issue of transitional justice.

While many discussions, as well as actors, still equate ‘impunity’ with the absence of criminal justice,¹⁰ the policy frameworks mentioned before define the term more broadly to mean ‘the impossibility, de jure or de facto, of bringing the perpetrators of violations to account.’¹¹ Impunity in this sense arises from a failure of the State to meet one of the following four obligations under international human rights law: to investigate serious human rights violations; to prosecute, try and duly punish perpetrators of such violations; to provide victims with effective remedies and reparation for the harm suffered; and to take the appropriate steps to prevent a repetition of violations. These measures have proven in practice to provide the ‘best chance’ to provide somehow an account and answer to horrific crimes and violations, which should not have happened. The idea of fighting impunity is, thus, linked to accountability for past wrong. Impunity is the opposite of accountability.

As mentioned, there are different forms of accountability measures, and practice has shown to be a great resource of the different accountability measures taken to account for serious

to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, UN doc. A/RES/60/147, 21 March 2006.

⁹ Ibid.

¹⁰ In the EU practice the standard when it comes to crimes under the ICC Statute is to “ensure appropriate investigation and – where there is sufficient evidence – prosecution” for these crimes should be pursued by national jurisdiction, and if they are not willing or able to do so by the ICC. See e.g., Council of the European Union, Conclusions, International Criminal Court, 30 September 2002 - Annex, EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, p. 2. This practice of the EU does however not exclude that there might be other, parallel, obligations under international law and practice for example around reparations, truth seeking and putting guarantees in place to ensure non-recurrence, see Council conclusions on EU's support to transitional justice,

adopted by the Council at its 3426th meeting held on 16 November 2015, available at <https://data.consilium.europa.eu/doc/document/ST-13576-2015-INIT/en/pdf>. Please see below also the Chapter on Foundations, page 7.

¹¹ Ibid.

violations of the past. They stem from trials, to truth seeking efforts, such as in the framework of a truth commission or also in informal truth seeking initiatives by civil society actors, for example around the search for the missing, to large scale reparation programmes, as well as to reform efforts such as of an abusive security sector, land reform to undo unjust distribution of wealth, or to support an education system to integrate multiple forms of narratives of the past in order to start an ongoing debate about the past as a way to prevent its recurrence. Memorials and other forms of cultural/societal rituals, such as burial ceremonies or also arts and theatre, have also been used to provide answers to the often unspeakable that mass crimes have left in a society. What is inherent to all these measures is that they come in the form of sanctions, legal, but also moral, political, social or even metaphysical. Sanctions are the conduit on how answers count, become relevant to account for the injustice done. Recent definitions of the fight against impunity have also included as a part of an accountability agenda, to scrutinize the conditions and drivers that led to the violence in the first place (e.g., looking at the root causes).¹²

Also, the consequences of failing to fight against impunity have been highlighted in recent discussions, such as in the framework of the SDG and agenda 2030 discussions. First evidence, including by the World Bank, has shown that countries who do not break the cycle of impunity (which comes when accountability measures are not put in place or do not have an effect) are more easily to relapse into conflict and violence.¹³

What notion/scope of the fight against impunity an Observatory will apply is an important question the second part of this report will further address. For now, it is considered important to highlight the dynamic and fluid, and therefore changing, borders, of the fight against impunity. An important parameter for the future role of an Observatory will be on what makes a difference on the ground, has impact, and what is feasible/sustainable for an Observatory to do.

¹² See discussions at the UN around SDG16; Justice for all report (2019), at <https://www.sdg16hub.org/system/files/2019-06/Pathfinders-%20Justice%20for%20All%2C%20Report%20.pdf>

¹³ UNDP. 2011. *Human Development Report 2011: Sustainability and Equity - A Better Future for All*. New York. <http://hdr.undp.org/en/content/human-development-report-2011>

FOUNDATIONS OF THE FIGHT AGAINST IMPUNITY IN UNIVERSAL HUMAN RIGHTS

The global ‘anti-impunity’ discourse can hardly be fully appreciated without consideration of another key phenomenon of our times: universality of human rights. The central *moral* claim here is that ‘there are moral obligations owed to all human beings based solely on our humanity alone, without reference to race, gender, nationality, ethnicity, culture, religion, political affiliation, state citizenship, or other communal particularities’.¹⁴ The idea is here that the *individual human beings* should be our primary moral concern, no matter who they are or where they live. From this perspective, then, it makes good sense to extend our moral concern beyond our borders and not to be indifferent to the needs and suffering of people just because they happen to be ‘outsiders.’

The universality of human rights has increasingly found its way into international legal norms and institutions.¹⁵ The establishment, in 2002, of a permanent, The Hague-based International Criminal Court (ICC) is perhaps most illustrative in this respect. At its core, the Court rests on the belief that ‘unimaginable atrocities’ such as crimes against humanity so ‘deeply shock the conscience of humanity’ as to be ‘of concern to the international community.’¹⁶ The ideals of universality are also at the heart of efforts around universal jurisdiction or international investigations by UN fact finding mission, or the latest development of evidence-gathering mechanisms such as the mechanism for Syria (IIIM).

¹⁴ G. Wallace and D. Held, ‘Editors’ Introduction’, *The Cosmopolitanism Reader* (Cambridge: Polity Press, 2010), at 1.

¹⁵ This study will not explicitly reconstruct here the international normative framework for serious crimes as expressed in the Rome Statute of the ICC, which would go beyond the ToRs. The study builds of course on this framework, as recognized by the International Court of Justice and the UN International Law Commission, that there is a peremptory norm that prohibits the perpetration of crimes under International Law (a *jus cogens* prohibition), which is supported by the Preamble of the Rome Statute which reads: “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

¹⁶ Preamble to the Rome Statute, par. 2 and 4. See also A. Duff, ‘Authority and Responsibility in International Criminal Law’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 587-604, at 601.

It is this cosmopolitan idea of all human beings *as* rights-bearers that underlies and shapes the anti-impunity discourse. There are different moral theories of relevance to the issue of fighting impunity that serve to some extent as a justification for the cosmopolitan idea of universal human rights.¹⁷ For instance, *teleological* (or goal-based) moral theories find some expression in making linkages between fighting impunity and creating ‘just and lasting reconciliation’ or ‘democracy.’ But beyond such goal-based considerations, fight against impunity has a strong *deontological* (duty-based) dimension to it. The ‘anti-impunity’ discourse is essentially framed in terms of ‘obligations of states to take effective action against impunity.’ This ‘deontological’ perspective, however, is intrinsically bound up with the idea of rights, and specifically human rights. Typically, the state correlate with specific rights on the part of the victims of human rights violations: the obligation to investigate violations and preserve memory correlates with the right to truth and the right to know, the obligation to prosecute and duly punish the perpetrators with the right to justice, and the obligation to repair the harm suffered with the victims’ right to reparation.

Central, here, is the idea of human rights as ‘strong’ entitlements.¹⁸ The reasoning behind this idea goes something like this: if human rights *matter* as basic entitlements held by all of us in virtue of our being human, then they must be *concrete* rights – namely, high-priority claims effectively enforced by state institutions (courts, legislatures, government administration, police forces and so on) making sure that certain basic human interests are equally protected and that, where violation occurs, reparation or punishment is reliably enforced. But far from an isolated phenomenon, this understanding of rights is best seen as a wider reflection of the international human rights discourse as it evolved throughout the ‘long’ 1990s. As already mentioned above, in the arena of global and regional human rights institutions, there has been a shift in emphasis from naming and shaming human rights violations towards effectively addressing the consequences of such violations. With this in view, some commentators have spoken of a new

¹⁷ R. Dworkin has referred to ‘goal-based’, ‘duty-based’ and ‘rights-based’ approaches to ethics. See R. Dworkin, *Taking Rights Seriously*, (Cambridge: Harvard University Press, 1977), at 169-170. For an insightful discussion of anti-impunity from the viewpoint of normative ethics, see also M. Pensky, ‘Two Cheers for the Impunity Norm,’ *Philosophy and Social Criticism* (2016), 1-13.

¹⁸ See T. Campbell, *Rights: A Critical Introduction* (London: Routledge, 2006), at 40.

‘age of enforcement,’¹⁹ where human rights are not merely declared but concretely realised and enforced. Whether or not this is an accurate characterization of present times, anti-impunity concerns have increasingly become integrated into mainstream human rights theory and practice.²⁰ Not least evidence of this is the jurisprudence of the Inter-American Court of Human Rights.²² In its landmark case *Velásquez Rodríguez*, the Court famously stated:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.²³

This passage contains, it has been noted, ‘the first truly comprehensive statement of a state’s human rights obligations’.²⁴ It sets the stage for a holistic approach to anti-impunity, according to which the four state obligations are distinct yet complementary components of ‘a fair policy

¹⁹ H. Rombouts, P. Sardaro and S. Vandeginste, ‘The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights’, in K. de Feyter et al. (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen; Intersentia, 2005), 345-503, at 355 (italics omitted).

²⁰ See Human Rights Committee, *General Comment 31*, Nature of the General Legal Obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004). For a detailed analysis of the relevant pronouncements of the Committee, see A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), chapter 2.

²¹ For overviews of the relevant case-law, see E. Brehms, ‘Transitional Justice in the Case Law of the European Court of Human Rights’, 5 *The International Journal of Transitional Justice* (2011) 282-303; J. A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era* (London: Routledge, 2013). On the duty to prosecute under the ECHR in particular, see ECtHR, *Marguš vs. Croatia*, Application no. 4455/10, Judgment, 27 May 2014.

²² Inter-American Court of Human Rights (IACtHR), *Velásquez-Rodríguez vs. Honduras (Merits)* (1988) 4, ser. C, 29 July 1988.

²³ IACtHR, *Velásquez-Rodríguez vs. Honduras (Merits)*, supra n 51, par. 174. For an analysis of the Court’s anti-impunity jurisprudence, see Seibert-Fohr. See also K. Engle, ‘Anti-Impunity and the Turn to Criminal Law in Human Rights,’ 100 *Cornell Law Review* (2015) 1069-1127.

²⁴ M. Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), at 8.

of accountability'.²⁵ Yet, this approach raises questions about what tensions may arise between these various pillars and how they may be addressed, especially in contexts of transition from armed conflict to negotiated peace.²⁶ What will be shown below, a challenge today is also that a principled approach has been replaced, also due to political and funding priorities, with a causal belief, that to remedy right violations is not enough (or politically not feasible) but it needs to be demonstrated that enforcing rights will also lead to peace, development and security. This opens a new dimension for the fight against impunity and potentially can risk in rendering it ineffective (by overburdening it) and, in the worst case, make it disappear.

At the same time, the universality project and with it the anti-impunity discourse as sketched out here conflicts with, or at least challenges, the so-called 'classical model of sovereignty'.²⁷ For much of its life, international law was essentially a system of mere inter-state coexistence predicated on the notion of *sovereign* states, free to run their internal affairs (including the fate of their own nationals) without outside interference. Under such a system, the wrongs done to foreign individuals were irrelevant unless they were taken up by their state of nationality, the assumption being that by acting on their behalf the state was 'in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rule of international law'.²⁸ In a world of 'cosmopolitanized nations',²⁹ this model appears increasingly outdated and is being

²⁵ J. E. Méndez, 'Accountability for Past Abuse', *Human Rights Quarterly* 19.2 (1997) 255-282, at 262. See also P. de Greiff, 'Theorizing Transitional Justice', in M. S Williams, R. Nagy and J. Elster (eds.), *Transitional Justice, Nomos LI* (New York: New York University Press), 31–77 (making the case for a holistic approach to transitional justice).

²⁶ On this issue see, in particular, IACtHR, *El Mozote and Nearby Places v. El Salvador* (Merits, Reparations and Costs), 25 October 2012, Ser. C No. 252, Concurrent Vote, Diego García-Sayán, para 38 (acknowledging that in such contexts a State may not be in a position to comply 'fully and simultaneously' with its various human rights obligations and that it may be legitimate to weigh these obligations 'in such a way that the satisfaction of some does not affect the exercise of others disproportionately').

²⁷ See E. J. Criddle and E. Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016), at 5-8.

²⁸ Permanent Court of International Justice (PCIJ), *Mavrommatis Palestine Concessions*, PCIJ Series A No. 2 (1924), at 2.

²⁹ The expression is taken from U. Beck and D. Levy, 'Cosmopolitanized Nations: Re-imagining in the World Risk Society', *Theory*, 30(2) *Culture & Society* (2013), 3-31.

fundamentally challenged by more individual-centred approaches to sovereignty pushing for a radical redefinition of the concept.³⁰ The fight against impunity can thus be seen as part of a larger debate on the redefinition of state sovereignty in a global age, with all the conflicts that come with this. That the trend goes more towards sovereignty and thus against a universal model of human rights will be shown in the next chapter that deals more specifically with contemporary challenges the fight against impunity is confronted with.

OUTLOOK ON THE FIGHT AGAINST IMPUNITY: GAPS AND CHALLENGES

What follows are a list of gaps and challenges that this report identifies as being the most prevalent that currently stand in the way for an effective fight against impunity. From the outset it can be noted that a majority, also from those interviewed for this study, supports the fight against impunity in the classical sense, as a principle-based call to accountability for core crimes and serious human rights violations ('core business'). There is a significant group of actors, often working with grassroots organisations on the ground, which are committed to the 'core business' of the fight against impunity but call for adjustments to solve contemporary problems on the ground that stand in the way to 'answer to past wrongs,' they are asking for measures that are fit to bring accountability. There is also some more fundamental criticism levied against the current anti-impunity framework that will also be listed to be comprehensive. The focus of the analysis here is, however, not aimed to suggest radically change to the anti-impunity framework, but to highlight gaps and challenges within the existing familiar structures and frameworks that have been used over the years to combat impunity. As will be seen, to address these gaps is already a tall order a future Observatory will need to grapple with. Contributing to addressing these gaps, with the aim to 'fine-tune' the fight against impunity, might represent an important opportunity for an Observatory to make the fight against impunity more effective in ensuring accountability for serious crimes and abuses that are of a scale such as genocide, crimes against humanity and war crimes. Taking a blind eye on the gaps or taking short-cuts will

³⁰ See International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, 2 October 1995, para 97 (holding that a 'state-sovereignty-oriented approach' is being gradually replaced by a 'human-being-oriented approach'); Report of the Secretary-General on the work of the Organization, UN GAOR, 54th Sess., 4th Plen. Meeting, UN Doc. A/51/1, 20 September 1999, at 1.

impact the effectiveness of an Observatory and undermine its visibility as an actor that is meant to contribute in a sustainable fashion to ensuring accountability.

CHANGING LANDSCAPE IS MAKING IT HARDER FOR THE FIGHT AGAINST IMPUNITY TO SHOW RESULTS

In the 21st century, the fight against impunity has become an integral part of the human rights landscape. Recent years have seen, however, a decline in the fight against impunity. This has to do with a changing geo-political world that undermines voices that promote universality of human rights. We see a retreat to promoting partisan, sovereignty interests often driven by economic and security interests of states or interest groups/actors. The fight against impunity which, as has been shown before, is intrinsically linked with the idea of the universality of human rights and its enforcement is losing its fundamentals. A fight against impunity that is driven by partisan interests can lead easily to a perception of one-sided justice, which has no justice value and can lead to further conflict. In addition, we are seeing an erosion of trust among citizens and between citizens and societal, often state institutions. Familiar institutions or entities that are responsible for justice, but also for security for all, have been dismantled and are replaced by institutions that protect only some, or some interests. Independent justice institutions have, however, been a natural ally in the fight against impunity, as has been trust in them. Without such institutions the seeking of the truth, to get answers, will be challenging. The trend we see to establish international bodies, which seek to preserve evidence or information of serious crimes, is important but can ultimately not bring accountability by itself, it needs actions and effective institutions on the ground to deliver/to enforce. International efforts, such as judicial cooperation around universal jurisdiction (UJ) is important, but they are just filling holes. There is a broad agreement, also from the interviews, that accountability must be local to effectively challenge impunity, which is reflected in the complementarity principle of the ICC Statute.

Another natural ally for the fight against impunity, civil society, is losing ground. Shrinking civil society space, can be globally observed, and leads to a push back in the fight against impunity. On a positive note, there are regional developments with the adoption of TJ frameworks in the AU and EU, and as stated before extensive case law in the Latin American context around the fight against impunity. As will be shown below more follow up and bold political response will be needed to move from policy to action. Lack of implementation is still a key challenge to the

fight against impunity. The changing landscape, moving more towards fighting for partisan interests, makes it of course politically harder to do so; to find political allies in the fight against impunity. Looking more specifically and courageously what the fight against impunity is up against these days, without falling in nostalgia on how good the end of the 90s and beginning 2000s were, can present and enable an opportunity to reflect what can be improved, but also where to focus and deepen the involvement. An observatory would need to be part of such discussions and demonstrate openness to address these broader gaps and challenges.

LOSS OF COMPASS IN THE FIGHT AGAINST IMPUNITY: NARROW APPROACHES IN THE FIGHT AGAINST IMPUNITY HAVE BEEN LEADING TO BLIND SPOTS, CLOSED THINKING, AND UNHEALTHY LEGALISM

The dominant approach in the fight against impunity has been criminal justice, to hold perpetrators individually criminal responsible. Some prominent actors argue that this ‘laser focus on anti-impunity’ in human rights³¹ ‘has created blind spots in practice and scholarship that result in a constricted response to human rights violations, a narrowed conception of justice, and an impoverished approach to peace’.³² While rooted in international obligations, the dominant approach has come at the expense of support to other TJ mechanism that are equally based in law. An ongoing study in over 20 countries by the Global Survivors Fund shows the huge gaps in the area of reparations for conflict related sexual violence.³³ The narrow dominant approach has also led to top-down approaches, often believing in ‘fixing’ the issue of impunity from above, through international mechanisms. This has been challenged now more also from within the anti-impunity community, where local solutions, including but not limited to criminal justice, are sought. Survivors, scholars, and practitioners have demanded a stronger inclusion of ‘justice from below’ perspectives in the fight against impunity. Scholars and activists have also challenged that an unhealthy legalism has crept into the fight against impunity. Legalism as famously defined by Judith Shklar, refers to ‘the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by

³¹ K. Engle, Z. Miller and D. M. Davis, ‘Introduction’, in K. Engle, Z. Miller and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), 1-12, at 2.

³² *Ibid*, at 2.

³³ The preliminary findings of the Study can be found here: <https://www.globalsurvivorsfund.org/guide>

rules.’ One central feature of legalism, so understood, is ‘the attendant belief that law is not only separate from political life but that it is a mode of action superior to mere politics.’ The anti-impunity framework, by also focusing on criminal justice, has taken over such legalism along these lines – as an institutionalized effort to legally tame political power and prevent arbitrary compromising at the expense of victims of human rights abuse. Legalism, however, has been criticized, among other things, for exaggerating the power of law to solve complex problems; propagating an unduly abstract idea about people; over-concentrating on the ‘state’ at the expense of other actors and sites; obscuring the quintessentially political nature of legal decision-making; failing to engage with patterns of socio-economic injustice and maldistribution; excessively relying on an ‘absolutist’ vocabulary that rules out compromise. The normative model often used in the fight against impunity is infused with legalism. It defines, so critiques argue, the fight against impunity as a discrete, neutral framework couched in the objective language of human rights obligations and rights. What underpins this ‘human rights legalism’ is a firm belief in the power of international law and legal procedures to ‘solve’ the problems of transitional societies. There may be comfort in construing the fight against impunity as a secure and coherent system of rules. The normative model’s great attraction may be precisely this – to keep moral confusion and uncertainty at bay. But this quest for certainty comes also at a cost. It easily blends into the sort of ‘closed thinking’ that is resistant to critical questioning or contrary evidence and unresponsive to different perspectives or problems that do not fit into the preferred view of how the world works. Unable to pass beyond itself and to be open to other worldviews, closed thinking is at constant risk of being trapped within its own confines. For instance, by neatly dividing the world into violators and victims, human rights legalism tends to suppress the uncomfortably ambivalent realities of political violence, its grey zones, and deep-seated complicities. Something is then lost along the way, something which David Kenney refers to as ‘the habit of grappling with ambivalence, conflict, and the unknown.’ (More on this below on the challenge that there is a lack of working together in the fight against impunity).

Another gap that has been identified as a consequence of the “laser focus on the fight against impunity” is that it sidelined economic social and cultural rights. In practice the implementation of the anti-impunity framework clearly places its focus on civil and political rights (CPR), the torture, the enforced disappearances, at the expense of economic, social, and cultural rights (ESCR). Advocates of ESCR, however, will take issue with this division between two groups of human rights. In their view, the common claim that CPR and ESCR are fundamentally different is

exaggerated and does not stand up to scrutiny. ESCR, so the argument goes, are as essential for the freedom and wellbeing of the individual as long-established CPR and should therefore be given equal weight. On this account, then, the anti-impunity frameworks focus on CPR risks misconstruing the anti-impunity project as a human rights agenda by separating, rather than linking, what should be complementary elements of the global struggle against impunity.³⁴

A related critique of the narrow “laser focus” approach is that it focuses so exclusively on the ‘visible’ side of human rights abuse as to lose sight of its ‘invisible’ side. Part of this latter side is the role of beneficiaries – those who eventually benefit materially or socially from large scale injustice. As Mahmood Mamdani has argued with respect to South Africa’s Truth and Reconciliation Commission, a narrow focus on violations of CPR allows those who benefitted from a grossly unjust system to go away thinking that they had little if anything to do with these injustices. This also goes hand in hand with a global trend that gain is privatized, and loss is socialized.

LACK OF WORKING TOGETHER IN OVERCOMING DILEMMAS UNDERMINES THE EFFECTIVENESS AND SUSTAINABILITY IN THE FIGHT AGAINST IMPUNITY

There are real dilemmas the fight against impunity is faced with. Often there are dilemmas with other policy interventions, such as humanitarian efforts, security imperative, or mediation flexibilities around amnesties. The fight against impunity does, however, also have internal dilemmas, between the different obligations that are at its core. For example, the duty to prosecute with its punitive focus can, but not necessarily has to, stand in direct conflict with the duty to put in place guarantees of non-recurrence as a way to achieve peace and to prevent new violence. It can, as some have argued, of course also assist prevention, by seeing criminal justice as a deterrence for future violations, or by dismantling structures responsible for maintaining systems of impunity.³⁵ The point is, however, that if one treats victims’ right seriously and

³⁴ NB: The crimes in the ICC Statute can be interpreted to also encompass serious violations of ESCR. With the amendment of the Rome Statute in 2019 starvation is a war crime punished when committed in international and non-international armed conflict under the Rome Statute.

³⁵ See e.g. the reports of the UN SR on Truth, Justice, Reparations and Non-Recurrence, e.g. [A/HRC/30/42](#) (Guarantees of Non-Recurrence) and [A/HRC/27/56](#) (Prosecutorial Strategies), available at <https://www.ohchr.org/en/issues/truthjusticereparation/pages/annualreports.aspx>

comprehensively, then one must recognize the importance of both punishment and prevention – and in some exceptional cases, of amnesty (with the exception of blanket amnesties). As some commentators have argued, this is not only a moral and political argument: it is also a legal one.³⁶ The state obligation of suppression, prevention, investigation, and redress regarding human rights crimes are all important and must be balanced against one another and not assessed in a vacuum.³⁷ As Here it is relevant to recall that in international law, there is no explicit hierarchy of state obligations that concern the fight against impunity. There is only the challenge of reconciling these obligations in some way while respecting general principles of international legal interpretation - such as, for example, the principle that the specific trumps the general, and that the more recent trumps the less recent. These are often difficult choices, especially when it comes to amnesties. Sometimes the situation requires one to place more weight on the suppression and prevention obligations, and other times, on the justice obligations.

Protagonists of the fight against impunity are, however, very often caught in very rigid positions. The anti-impunity framework here is interpreted in an excessively rigid way and thus leaves little, if any, space for the sort of bargaining and trade-offs that may be required, and is in any case going on, in such contexts to end or constrain violence and enable peaceful adjustment. This issue is often discussed in relation to amnesty. Going back to the drafting history of the UN principles to combat impunity shows, however, that the anti-impunity framework was not meant to be a rigid system foreign to any political reality. The drafter of the UN principles Louis Joinet stated in the afterword to his revised final Report:

To those who might be tempted to regard the set of principles proposed here as an obstacle to national reconciliation, I would answer this: these principles are not legal standards in the strict sense, but guiding principles intended not to thwart reconciliation but to avoid distortions in certain reconciliation policies so that, once beyond the first stage, which is more concerned with

³⁶ Mark Freeman, *Necessary Evil*, Cambridge University Press, 2010, p. 59.

³⁷ *Ibid.*

‘conciliation’ than reconciliation, the foundations of a ‘just and lasting reconciliation’ may be laid.

Before a new leaf can be turned, the old leaf must be read! But the campaign against impunity is not just a legal and political issue: its ethical dimension is all too often forgotten.³⁸ The statement can be read as defending openness, without throwing overboard the principles, but rejecting rigidity. There is an understanding here that the anti-impunity framework is best viewed, precisely not as strict legal rules, but rather as ‘guiding principles’ flexible and open-ended enough to allow for accommodation and ‘conciliation’ in times of political transition. Diane Orentlicher, a world leading expert in the fights against impunity, takes a somewhat similar stance saying that the anti-impunity framework provides ‘practical guidance for contemporary challenges, while leaving ample space to accommodate further evolution in our understanding of “best practices in combating impunity”’.³⁹ Moreover, Orentlicher takes pains to stress ‘the quintessentially local project of communal reckoning’ and the importance of honoring ‘the unique experience and agency of each society’.⁴⁰ The current discussions in Colombia that move away from amnesties for serious crimes towards a system of reducing the punishment for such crimes might show an alternative model that better squares the demands for justice and peace. It is, however, premature at this stage to make any definite statement in this respect. At least latest statements by the ICC Prosecutor seem to suggest that such a model is in compliance with the Statute of the ICC, especially with the principle of complementarity.

For all that what just has been mentioned there is unfortunately no forum where these dilemmas, potential conflicts can be adequately discussed. This leads to misperceptions and biases within the community that works on combating impunity. The rift between those working on transitional justice and the once working on criminal prosecutions is still there and undermines the fight against impunity. The EU supported Human Rights Defenders network

³⁸ Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997), at paras 49-50.

³⁹ Haldemann/Unger, *The UN Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law), 2018 at Prolog

⁴⁰ *Ibid.*

(Protect Defenders network) shows how different approaches and ideas can enrich a certain end goal, in this case to protect human rights defenders. Similar efforts are needed in the fight against impunity. There is a real risk in not pro-actively engaging in discussion around dilemmas in the fight against impunity. Engaging does not mean to give up principles but to be politically smarter and realistic in ensuring the enforcement of human rights especially in situations of conflict. This will also help to make a political case for action.

What is important is to work together to find workable solutions and to overcome existing biases. One area that is crucial is the sharing of information. Without information no accountability mechanism will work. But equally no humanitarian mechanism will work (e.g., the search for missing persons depends heavily on information). This is an area where pragmatic and problem-solving efforts need to be taken. Coordination would have to be significantly improved also to overcome fundamental differences in approaches. Assurances would need to be given that some information cannot be shared with criminal justice processes. There are first good attempts coming from the International, Impartial and Independent Mechanism for Syria (IIIM), a mechanism that was created to assist in the investigation and prosecution of war crime and serious human rights abuses committed in Syria to find methodologies to share information on missing persons with other expert organizations such as the international Committee on the Red Cross (ICRC) and International Commission on Missing Persons (ICMP).

ACCOUNTABILITY IS OFTEN LEFT OUT OF DISCUSSIONS IN HOW TO OVERCOME CONFLICT AND HOW TO SUSTAIN PEACE.

While fighting impunity is recalled in policy statements by the EU and others in practice it often takes a back seat. While first data shows the opposite and links sustaining peace to efforts around accountability, on the ground political follow up is missing. While policy frameworks such as the EU framework on TJ claim that justice is a part of peace building, we see in practice a lack of integration. The practice of amnesty granting seems revealing in this regard. Empirical work has suggested, amnesties have not dramatically decreased in number since the late 1980s and continue to be used in countries facing political crisis – a development difficult to reconcile

with an anti-amnesty stance.⁴¹ That might also explain why there is no convention on combating impunity or any other form of formally adopted framework by the different multilateral human rights fora. The efforts around a convention on crimes against humanity is moving extremely slow.

THE SUPPORT AND DECISION MAKING ON FIGHTING IMPUNITY IS CHARACTERIZED BY KNOWLEDGE AND CAPACITY GAPS WHICH UNDERMINES REAL IMPACT IN THE FIGHT AGAINST IMPUNITY

The information environment for making decisions on the fight against impunity faces numerous challenges. Most fundamentally is that donors and decision-makers may not have sufficient theoretical or practical knowledge about the fight against impunity to make decisions about meaningful and sustainable support. Additionally, there is little evidence on the impact of the familiar measures used in the fight against impunity; and as long as there are sufficient number of core supporters who do not require evidence to allocate funds, there will be little incentives to fund expensive and time-consuming impact evaluations that are needed to enhance information for decision making. Other challenges include the fact that there may be little expertise in-house on the fight against impunity for most of the decision makers and donors, that such actors struggle to maintain institutional memory, and that they do not have mechanisms for learning from projects that have been *funded* in the past. Some efforts have been undertaken by the EU TJ facility to do trainings, but more would be needed, also in terms of resource to arrive at a level where informed decision making is possible.

Institutionalization within decision makers is slow in the area of combating impunity, the Swiss federal department for foreign affairs being the only one that has a dedicated unit on dealing with the past. The strongest institutionalization we have seen is in the area of criminal justice. Here we see also more institutionalization within the EU and its MS, while many who have been interviewed say it is not enough. Nevertheless, EU Foreign Ministries and Ministries of Justice have usually departments and units dealing with international criminal justice, within the EU the mandate of the EU SR on Human Rights was expanded to also include international crimes, the

⁴¹ See e.g., the work of Luise Mallinder: <https://www.politicalsettlements.org/wp-content/uploads/2019/08/Amnesties.pdf>

EP has a focus on international criminal law and atrocity prevention within its sub-committee on human rights, there is also a traditional funding priority for criminal justice within the European Commission when it comes to the fight against impunity, and this is also slowly expanding to other areas, such as supporting TJ work through the EU's FPI TJ facility and support to the implementation of the AU policy framework on TJ. There is, however, limited knowledge, for example, within the European Commission on 'what works' in the area of fighting impunity. Within the EU and its MS, institutionalization on the fight against impunity has been promoted through the Genocide Network. Here again the focus is on enhancing judicial cooperation around investigation and prosecution, but we see still some resistance for further institutionalization where some EU member states did not adopt implementation legislation for Rome Statute core crimes. But joint investigation teams of Germany and France, in the context of universal jurisdiction cases coming out of Syria, have brought real action.

The lack of institutionalization has led to a trend of outsourcing the work on fighting impunity, especially to civil society and international justice institutions. They need obviously to be supported, but they equally need strong political allies to follow up on their work and this, the interview process has shown, is still lacking. The lack of knowledge and institutionalization leads to less of control and fragmentation in the fight against impunity, which can also lead to duplication and potential conflicts even between actors that are supporting the fight. One example can be Belarus, where an accountability network of civil society has been established to gather evidence and seek for ways to achieve accountability for alleged crime of the regime in Belarus. At the same time, we see also the Human Rights Council establishing a mandate to investigate serious human rights violations in Belarus. Often these multiple mechanisms do not cooperate with each other, especially do not share information with each other. Except in specific country situations, such as Syria and Myanmar, no follow up repositories exist that can cater to the long-term needs of organizations/mechanisms to achieve accountability. In other situations, like South Sudan, the documentation landscape reminds one of the 'wild west' where information is taken out by non-state actors, including civil society, often without legitimacy, applying different standards of handling the information/evidence that seriously undermines its usage in accountability processes, as well as with different ideas in mind for what purpose the information should be collected and used for (mostly for criminal justice purposes at the expense of other accountability measures). The strategic vision that is so important for the fight against impunity in order to get results that can make a difference on the ground is seriously

undermined, as well as potential ideas and interests that victims and grassroots organization have on how they would like to design their accountability approach in a specific context, are left out.

Linked to the latter, the combination of high-profile ideas (global fight against impunity) but low institutionalization and information can easily lead risk-averse donors to fall into general patterns: preferring to invest in visible, finite 'outputs' like commissions, courts, or memorial sites on the one hand, or in countable deliverables like expert trainings, small scale community workshops and research reports. They may resist supporting the more politically risky, long-term, and difficult to measure social change work that is actually at the core of combating impunity. Often also anti impunity agenda needs to fit into 'current flavor' of the month policy paradigms such as 'fragile states,' 'security and development nexus' etc. This has pushed the fight against impunity into work, beyond its 'core business' such as prevention, security sector reform, DDR, corruption, poverty reduction and countering violent extremism. All agendas the fight against impunity may contribute to and should obviously be coordinated with, as much as possible, but will not be able to be the main driver itself. This trend just highlighted has pushed the fight against impunity from following a more principled belief to be embedded in a causal belief narrative (e.g., fighting impunity leads to prevention and sustaining peace). Donors, especially those who are promoting access to justice work within the framework of the SDG16 discussion require causal narratives that link the fight against impunity to a growing list of outcomes, expanding from improving human rights to stabilizing lawless regions and countering terrorism. Civil society has often happily gone along with this, or did not have a chance because of funding reasons, without much evidence to support their arguments. There is obviously growing evidence that hints towards showing some link between the fight against impunity and sustaining peace, but the data-collection is fragmented, and often selective, broader conclusions based on hard evidence can still not be drawn. Measuring the impact of the fight against impunity is also qualitative and differs so much from context to context and is thus a challenging exercise. Since grassroots voices and victims are often excluded from decision making a sounding board on what works on the ground is missing. This would, however, require to more systematically bringing victims and survivors to the table. This brings us also to the last and final challenge this report wanted to highlight.

THOSE WHO HAVE THE KNOWLEDGE/EXPERIENCE ARE NOT LISTEN TOO, OFTEN MISINTERPRETED, WHICH DISCONNECTS THE FIGHT AGAINST IMPUNITY FROM BEING EFFECTIVE IN MAKING A DIFFERENCE ON THE GROUND.

As mentioned before, framed in abstractly universal terms, the anti-impunity framework invites the criticism that it delivers a form of ‘justice from above’ – remote from and inaccessible to the local communities most effected by violence and conflict.⁴² Far from insensitive to this issue, UN expert Diane Orentlicher stressed in her landmark report ‘the importance of public consultation in shaping anti-impunity measures’ and took pains to strengthen this dimension in the updated version of the Principles.⁴³ The issue of local ownership remains, however, largely side-lined by the effort to articulate a unified, universally applicable scheme for combating impunity that is based on a best practice ‘tool box’ of pre-determined mechanisms and strategies. This sort of professionalization of transitional justice raises issues and problems strikingly similar to those noted by Séverine Autesserre in her recent analysis of international peace interventions.⁴⁴ Drawing on in-depth ethnographic research in conflict zones, Autesserre identifies every-day attitudes and modes of operation that potentially render such interventions ineffective or even counterproductive. Interveners, she suggests, tend to ‘value thematic expertise over local knowledge,’ ‘favor technical, short-term, and top-down solutions to complex social, political and economic problems’ and ‘orient these solutions towards quantifiable results.’ As a result, interveners often lack a nuanced understanding of the context in which they work and rely, instead, on pre-defined models/formulas. In most cases these pre-established formula, are too ambitious thus are not fitting the context where they are supposed to be applied. Let us take for example the Central African Republic, where the peace agreement foresees the implementation of the whole four-pillar structure of transitional justice, in a country that has a central government without power, weak or non-existing institutions, most of its territory controlled by different non-state actors, and no civil society. But even countries like Colombia that are more sophisticated in terms of institutionalization struggle to meet the goals of transitional justice

⁴² McEvoy, Kiren and McGregor, Lorna (eds). *Transitional Justice from Below: Grassroots Activism and Struggle for Change*, Hart Publishing, Oxford, 2008.

⁴³ Report Orentlicher, supra n 65, at 6. See also Principles 6, 32 and 35.

⁴⁴ Autesserre, Séverine, *The Frontlines of Peace*, Oxford University Press, 2021.

that have been brought upon them from outside. This all is not to say that there should not be any standards. The legitimacy of transitional justice mechanisms depends heavily on whether they are in compliance with due process standards, and in some cases, there might also be binding international obligations, but norms and standards have in-built flexibility. So, the goal should be to look for “good enough” approaches that fit the context, especially in situations of fragility or failed states, and not for “best practice” models which even Western governments would not be able to meet. This will also help to manage expectations, provide space for local solutions, and show some progress and success. Some civil society groups are moving away from integrated or holistic approaches towards a broader set of approaches, or “basket of ideas,” in the area acknowledgment, accountability, and reform, which will vary widely in implementation, depending on the local context. The EU’s framework on TJ support reflects this short-coming by calling for more context specific analysis. Also, the inclusions of processes that sound out good and bad practice from the perspective of victims and the grassroots would need to be strengthened and currently do not exist which leads to a distortion, specially at the international level where supposedly good practices are presented, including by UN agencies, in order to get funding, but where grassroots organization warn that these practices are counter-productive to achieve accountability and justice on the ground.

In sum, in terms of outlook, and taking all of these challenges together, it remains to be seen whether changes in ideas and interests currently under way – whether related to the post 9/11 environment, the migration crisis, the changing geo-political focus on the relationship between the US and China, the growing need of the EU to position itself as a Union that can provide security and be bold in its own foreign policy, the consequences of climate change and the Covid 19 pandemic, growing inequalities, combined with insufficient institutionalization and information on the fight against impunity may lead to softening of assistance in combating impunity and accountability. Has the agenda of accountability reached its apex and is starting a downward trajectory, is a real question today. While the normative architecture will remain, and from the side of the EU is also reinforced through a new HR sanction regime and its staunch support to the ICC, the financial architecture, at least, is undergoing changes by the world’s major donors (the conversation on pulling back from the idea of support to state building after the Afghanistan experiences will be interesting to follow). This is putting sustainable and long-term work on the fight against impunity under pressure. But it also, and here might be an opportunity, push it to evolve. The question of accountability after serious human rights

violations will not go away, even if it is no longer political opportune. There is a potential to see the return of stronger local activism, which has accountability as a core rallying theme. We see this through a growing network of grassroots activism (see e.g., INOVAS below reflected in the actors mapping, as well as the work of Syrian family organization around the issue of the missing) and more sophisticated and targeted strategic litigation at the local level by civil society (see for example the work of the NGO Mwatana in Yemen).⁴⁵ Civil society that aims to make a difference is more innovative and needs to find new strategies to cooperate on the national and international level (as they did in the past when the ICC was set up). There might be the need of building more and stronger anti-impunity constituencies in the different countries/ regions in order to find resonance between the fight against impunity and other important social issues, e.g., to create better structures that respond to what is important for younger people and to socio-economic development, and to develop networks with a wider set of actors. The civil society eco-system that is developing out of the AU policy on TJ is interesting to observe on the African continent, and as the EU does, worth supporting. What will be continuously required is that such new actions need powerful allies such as the EU.

⁴⁵ <https://mwatana.org/en/ourstory/>

The actors landscape on fighting impunity is diverse. Activities happen at different levels, locally, national and internationally, as well as focus on different activities and thematic priorities. Diversity is a chance but can also be a curse when it leads to fragmentation and lack of cooperation, as well as competition over funding, by the various actors that are working on the fight against impunity.

Traditionally the focus of more coordinated civil society actions was on promoting first the idea of and now the work on an independent and permanent International Criminal Court. Here the current focus of civil society is on advocacy around ratification and implementation legislation, but also on pushing for specific cases before the ICC, but also seeking to ensure its well-functioning. The key actors here continue to be the Coalition for the ICC (CICC), which has seen a change of convener lately, AI, HRW, Parliamentarians for Global Action (PGA) and FIDH. This Coalition has a broad reach and has over the years been successful in keeping the topic of the ICC on the agenda. The changing political landscape (that is less enthusiastic about the ICC), criticism of the ICC's work, as well as keeping the Coalition together has had an impact on the effectiveness of the NGO Coalition. Diversification and focus on complementarity, to have local justice actors driving the anti-impunity agenda would also require some rethinking in the work of the Coalition, as some interviewees mentioned. The TJ framework is still seen with suspicion, as the interviews show, which can be counterproductive given the multiple and changing needs of victims, as well as the parallel obligations under international law that require states besides investigation, also to provide reparations, seek the truth and put guarantees in place to ensure non-recurrence. Some interviewees, however, claim that intersectionality is more and more embraced in the work around fighting impunity. In any case, there seems strong agreement that

⁴⁶ The specific focus on civil society in this section is responding to the TORs. This section should also be read in conjunction with Study "State of Play" (2020) by the European Parliament which lists the various actors working on fighting impunity from a criminal justice perspective, available at [https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2020\)603499](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2020)603499)

strong advocacy role continues to be needed and the ICC will remain at the core of the anti-impunity movement requiring civil society to do advocacy.

There are a lot of CSO actors that engage in the collection of information about international crimes, such as core crimes of the Rome Statute, serious human rights violations, as well as serious violations of international humanitarian law. The collection is done with different purposes in mind, or sometimes even without a specific plan. The majority is still using the collected information for classical human rights reporting leading to recommendations to policy makers. Recent years have seen, however, the creation of specialised NGOs that are collecting evidence of international crimes themselves on the ground. New technologies and partnerships with local actors have been built. The EU has also strategically supported such efforts in Syria, Myanmar and South Sudan, to give some examples. There is a close cooperation and respect among some of those CSOs that work on universal jurisdiction cases, such as TRIAL, ECCHR, Redress. There is in-transparency by others around collection and sharing of information, often legitimate due to security and safety concerns, but sometimes over-emphasised and elitist, as some interviewees mentioned. CSOs that engage in investigations often work with local NGOs and lawyers in various contexts in the world. One example is Belarus where we have seen a combination of Belarusian HR NGOs working side by side with international NGOs on the collection of information and pushing in various fora for accountability. Libya and Yemen are similar cases to be mentioned here, as well as initiatives at the local level such as by the Centro de Investigacion de Crimenes Atroces (CICA) in Mexico. An NGO called Legal Action Worldwide is advancing strategic litigation (using the law to pursue accountability in various fora, such as courts but also with human rights mechanisms) in various contexts and with a clear strategy in mind in building cases, using layer after layer to arrive at concrete results for their clients. All these NGOs that work on strategic litigation mentioned the need to improve the gathering of information, but also the preservation of it (e.g., how it will be transferred, managed and stored), which is costly and often an afterthought despite the long-term needs in the fight against impunity. There is, however, also criticism that came out of the interview process of some of the strategic litigation work especially by INGOs. They are often going after evidence without being very strategic, are expensive in their operational costs, and oversell their link to local grassroots groups.

In terms of focus and approach for the gathering of information the interview process and the consultation with civil society actors expressed the important to take a holistic approach and also address corruption and economic crimes allowing or associated with human rights violations and promote asset recovery for the purpose of providing reparations to victims of international crimes.⁴⁷

The new evidence gathering institutions, such as the IIIM, provide good opportunities to establish standards and good forms of collaboration. More support is, however, needed also for standard setting work within the OHCHR on follow up work after a fact-finding mission closes (e.g., how to preserve the information and make it usable for future accountability measures). There is a dedicated Investigation Support Unit that was established to ensure more coherence and adequate follow up to various inquiry commission and mandates established in recent years. The Unit with its global reach continues to be in need for resources to build a comprehensive database/archive that can be made accessible for future accountability processes.

A good example for a cooperative approach that ultimately strengthen information gathering is the “Lausanne process”. The “Lausanne process” aims to facilitate the engagement of the IIIM with Syrian NGOs and victims’ organisations. Impunity Watch and its strategic partner the Syrian Centre for Media and Freedom of Expression (SCM, acting on behalf of the Syrian Transitional Justice Coordination Group), assisted in the organisation of various meetings since 2018 together with the Dutch and Swiss MFAs. For Syrian victims, this is an important process to interact with and there is overall trust by victims and CSOs in the work and functioning of IIIM which is essential for sharing of information. Through the Lausanne Protocol of cooperation between the IIIM and Syrian Civil Society Organisations of April 2018, a way has been paved for signatory NGOs to cooperate with the IIIM and present information. The protocol of cooperation forms a guideline for IIIM and NGOs “to ensure mutual understanding regarding opportunities for collaboration, in furtherance of the parties’ common goal of ensuring justice, accountability, and redress for victims of crimes committed in Syria.” The IIIM-takes a victim-

⁴⁷ Please see recent NGO submission by GSF, REDRESS, TRIAL, ECCHR and others regarding the new MLA Treaty: <https://redress.org/news/new-treaty-must-include-provisions-on-asset-recovery-to-provide-reparations-to-victims/>

centred approach, which is most valuable for victims in terms of recognition and understanding their needs. The IIM is also committed to and includes medical and psychosocial support for those victims at risk of re-traumatization.

The sharing of information among civil society and between civil society and international accountability mechanisms remains, however, an issue. The 'big' human rights NGOs are hesitant in sharing information, NGOs that work on strategic litigation see a need, even an obligation to do so. Here more confidence building measures and finding practical solutions are needed. This is a thematic topic a future Observatory can make an important contribution to.

Beside advocacy and the actual collection of evidence, technical assistance and sensitisation of groups on the ground around the fight against impunity is also a task many international NGOs are taking on. FIDH, for example is doing this through its immense network of local partners. Here the focus is also on new areas such as how to gather and use open-source information in the fight against impunity. Civil society actors such as IICI and Bellingcat play an important role. Some academic institutions such as the Human Rights Centre at the University of Berkeley have equally immense experience and a great network and trust by actors. A new study on practice around information sharing in the fight against impunity is about to be finalised.

There is also great cooperation between international NGOs and victims groups or associations. Organizations such as Impunity Watch have done interesting work in Guatemala and Burundi. An example of a successful collaboration between local grassroots groups and CSOs supporting the fight against impunity is the Sepur Zarco lawsuit in Guatemala. It highlights the essential role of victim participation for justice. This legal case was built on an intense and long-term collaboration between women's organisations and survivors of sexual slavery in Guatemala's Polochic region. It involved a combination of legal strategies with psychosocial support for the survivors, memory practices and training and empowerment of the survivors. The resulting court case was ground-breaking, being the first one in which a national court convicted perpetrators for sexual slavery as a crime against humanity. Furthermore, the case is important for its sentence on transformative reparations which included wider social measures such as health and education support, as well as symbolic satisfaction measures. These demands were elaborated with the survivors themselves through a process of creative and participatory action research, carried out by international and Guatemalan academic and civil society researchers. This shows the importance of building alliances and equal collaboration opportunities between

survivors and civil society organisations. The Sepur Zarco case also shows the importance of broadening the focus of legal proceedings (justice and punishment) to restorative justice to improve the situation of the survivors through wider societal and community reconstruction. Similar approaches have been used by CSVR, a South African based NGO, in different TJ contexts in Africa. The Global Survivors Fund (GSF) also adopts a bottom-up approach. GSF's position is that mere consultations with victims and affected communities are not enough and they should be involved as key stakeholders and rights holders (as opposed to passive beneficiaries), shifting the discourse from "consultation" to "co-creation", not designing solutions and projects for survivors but with them. Each of their projects is developed locally to respond to specific needs and expectations of those affected and know best

A recent initiative that underlines the importance of victim participation, and which should be mentioned again here, is the creation of the International Network of Victims and Survivors of Serious Human Rights Abuses (INOVAS). Governments and policy makers often lack solid input from victim associations as stakeholders, as they are internationally dispersed and often lack shared tools to engage at the international level. Furthermore, victim associations often do not have a common language or joint demands, also making it difficult to influence policy makers. The creation of INOVAS brings like-minded victim associations together with the aim to have a voice at the international level and aims to better coordinate victim advocacy with justice actors.⁴⁸ Also the GSF is a direct response of a call by survivors. The SEMA network, facilitated by the Mukwege Foundation, was instrumental in this respect.

There are regional differences in the fight against impunity, with Latin America being traditionally at the forefront. There are strong regional CSO networks there with CEJIL and CELS. Colombia is currently the place which receives a lot of attention and where measures in the fight against impunity are put in place. We see, however, less political interests in 'older' contexts such as Guatemala where civil society is feeling to be left alone. There is a strong movement around fighting impunity in Africa, which has also been triggered by contexts where serious human rights violations took place, but also by a growing institutionalization of the fight against

⁴⁸ In January 2020, representatives of victim associations/organisations from Argentina, Colombia, Guatemala, Lebanon, Morocco, Nepal, South Africa, Syria, and Tunisia met in The Hague, defining together what the focus of a global network should be. The network was launched in December 2021.

impunity in the framework of the AU, with the recent TJ policy framework being one example. The continent has beside Latin American seen the strongest CSO networks and capacity.

At the level of the UN there is traditionally strong interaction between civil society, especially with the OHCHR and mandates established by the UN Human Rights Council. This work is less and less visible, however, given that the UN mandates have less political clout and often no access to the countries. The work is also often happening in a bubble and only known to a few. The newly established GFS which places survivors at its core is a good practice. A recent global study on reparations for conflict related sexual violence shows what can be done through a good network, a collaborative approach, on a topic that is under-represented and still a tabu issue.⁴⁹ To observe the follow up to the study's recommendation will be important.

As was mentioned at the beginning, the fight against impunity is much more diverse as it was a few years ago, some might say it is even fragmented. Fragmentation happened intensively after the Rome Statute came into force. Before the ICC was established, civil society had a mission, a clear focus, today this is less so. The positive side about diversity is a return of the local to the fight against impunity. Strategic litigation is big today, so is work with grassroots victims groups, as well as with the youth. The biggest challenge, however, is lack of continuity, with short funding cycles and a limited attention span by the international community, which moves often from conflict hotspot to hotspot. The risk of this approach is to abandon good work on the ground that needs sustainable support.

EU MS have been fundamental in supporting NGOs. The Dutch have been at the forefront, together with Scandinavian countries. But here, as mentioned, sustainability is an issue. Donor priorities change and with-it priority countries and regions, which we see currently for support in Syria and Iraq that is getting reduced, which risks undermining important projects, such as the work of family organisations working on missing persons in Syria.

There is not one leading NGO today in the fight against impunity, while there is still great work being done by organisations such as the CICC and its partners, the ICTJ or FIDH, in addition there is impressive work by strategic litigation networks around UJ, but, as come out from the

⁴⁹ <https://www.globalsurvivorsfund.org/guide>

interview process, it would be important for these networks to elaborate further on strategic and cooperative approaches in the joint fight against impunity. The work by Impunity Watch especially around victim participation is important and is filling a niche since it approaches the topic from the grass roots perspective and helps create international victims networks such as INOVAS. Civil society work on promoting the ICC continues to be important but has not moved on and do not seek new connections, also in the regions and on the ground their visibility seems limited. There are however strong regional NGO networks such as those led by CSVR in African and CEJIL in Latin America, Asia is still problematic and is in need to build strong victims networks,⁵⁰ in the MENA region we have seen such strong civil society networks especially around the context of Syria, but the political and financial support is fading away.

In any case, a future Observatory should build on the diversity of CSO work to make a difference in a more complex world. The future of the fight against impunity is local, hence an investment in strengthening local connections is essential and to avoid to overly focus on international criminal justice, while still not giving up on it. Finding a good balance is important. Good example of a network that builds on diversity is the US Department of State supported Global Initiative for Justice, Truth and Reconciliation (GIJTR or “The Consortium”) – led by the International Coalition of Sites of Conscience (ICSC). The Coalition leads a consortium of nine organizational partners that are specialized on transitional justice issue. According to the fact sheet the initiative “offers holistic, integrated, and multidisciplinary approaches to issues of truth, justice, and reconciliation. Driven by local needs and participation, the GIJTR creates context-specific program models in order to meet the multiple needs and goals of states, civil society organizations, local communities, and victims in post-conflict societies.” Such experiences could be useful for the Observatory to consider and cooperate with.

There are strong academic institutions that work on the fight against impunity. Different academic institutions have also taken different approaches, such as a bottom-up approach to the fights against impunity by the Ulster University, an interdisciplinary approach by Leuven University with a focus beside law also on criminology, there is great practical work by Columbia University with interesting project linking forensic science with countering impunity. NYU is

⁵⁰ Some interesting work is done by Asia Justice and Rights (AJAR): <https://asia-ajar.org>

currently focusing on the topic of prevention. The global campus on Human Rights has an enormous potential for global work on the fight against impunity through its enormous network and TJ expertise in different partner universities such as, Pretoria, Buenos Aires, St Joseph, Yerevan, Belfast, and Sri Lanka. The University of Berkley has strong capacity on documentation and empirical data collection on the fight against impunity. A future Observatory should tap into this knowledge.

Having outlined in Part I. the foundations of the fight against impunity and looking at some contemporary challenges in the fight against impunity, as well as mapping the work of actors, especially civil society, that have been making a contribution in the fight against impunity, the study will now become more concrete in setting out options on how an Observatory could look like. This will be done, in accordance with the TORs of the study by, first, identifying options for the scope of a future Observatory, secondly, by identifying possible activities that respond to the challenges and can make a real difference in fight against impunity and finally, thirdly, by presenting options for a mandate and possible governance structure of an Observatory. The study is not a place to give final recommendations and/or preferences for one or the other option, it will however present *pros* and *cons* of the different options presented and will be guided by feasibility and sustainability criteria. From the outset it can be clarified that the funding source for an Observatory sets already some key limitations. An Observatory will need to be of an external nature and funding will not allow to directly strengthen EU institutions (e.g., more EU staff). External will also mean that the focus of this specific programme funding is targeted towards supporting the fight against impunity by the EU in its external relations and not in fighting impunity internally within EU MS. This does, however not mean that the fight against impunity done through mechanisms within the EU, e.g., Universal Jurisdiction cases within an EU MS or the work of the EU's Genocide Network will not be indirectly strengthened through an Observatory.⁵¹ From the outset it also should be recalled that an observatory should complement existing structures and mechanisms but have the potential to contribute to improve and strengthen the common fight against impunity.

⁵¹ Exchange of information around criminal investigation, both operational and strategic, are facilitated by Eurojust, Europol and the Genocide Network.

IDENTIFICATION OF OPTIONS FOR THE SCOPE OF A FUTURE OBSERVATORY

To define the scope of focus of a future Observatory will be important. It will set the perspective from which an Observatory will look at the issue of impunity. Implications for feasibility, sustainability and impact will flow from that.

There are divergent views, also among civil society, on what the fight against impunity should encompass, ranging from a focus on ICC core crimes only, to including other serious human rights violations and abuses that are systematic or widespread (building on the new EU sanction regime and the EU actions plan on Human Rights), to a broader approach that includes also tackling systematic marginalisation, inequality, in particular in the area of gender, and discrimination (root causes of impunity). Impunity itself, as the absence of accountability, is considered as one of the main root causes for human rights violations.

The global trend, also supported by the OHCHR, goes towards a broader definition of the scope of the fight against impunity, which would include as serious human rights violations, both civil and political rights (the torture, the enforces disappearances, the killings) and economic and cultural rights (land-grabbing, corruption, forced starvation). Modern conception would also include abuses by non-state actors and corporations. What holds them together is the systematic or widespread nature of these violations and abuses. This gives the scope some borders and limitations, so that not every single rights violation or abuse is covered by the fight against impunity.⁵²

The promotion of indivisibility of human rights, a key demand of the EU treaties, as well as the changing experience on the ground are strong arguments in favour of having such a broader scope that goes beyond the ICC core crimes. Also changing political priorities and demands, such as to look at the fights against impunity in the context of migration, are important from an EU perspective. It would be difficult for a contemporary Observatory dedicated to the fight against impunity to not be engaged beyond the ICC core crimes. The downside of a broader approach is

⁵² An attempt to provide some legal background on the scope of the fight against impunity can be found in annex 3. The study uses as a shorthand serious human rights violations and abuses.

obviously a need for more resources and skills. One could, however argue, that the benefits outweigh the drawbacks. If feasibility is of concern, then a further narrowing can be done through thinking about, beside the material scope (*ratione materiae*), of criteria in which kind of situations an Observatory should be active to have maximum impact and catalytic potential for transformation (see below some possible criteria that delineate e.g., the temporal scope). Given that the Observatory might have an EU brand, or be closely associated to, will also give some form of focus on the EU's Human Rights Agenda. The challenge of taking a slightly broader approach might be that the current practice of the EU and EU MS supports the fight against impunity from the perspective of the ICC core crimes, this has been the traditional focus. Recent policies, such as the EU's policy framework on transitional justice, the human rights action plan, and the EU human rights sanction regime take however a broader scope and focus on gross/serious human rights violations and abuses, as well as on serious IHL violations. To improve coordination and integration of the fight against impunity in other policy priorities, such as the humanitarian affairs, protection of civilians etc. will be important in order to avoid conflict.

Where there seems consensus in the fight against impunity is the importance of seeking accountability for such serious violations and abuses. There is also a growing support to measures that try to avoid/prevent mass atrocities in the first place.⁵³ For both accountability and prevention, the debate is more about which measures are the most effective. The commitment to take victim-centred approaches has broadened the possible list of measures that could be used to account for serious violation that can also amount to international crimes. An important dimension is that any kind of measures of accountability and prevention should lead to change on the ground. The heavy mechanism focused 'toolbox' approach, where the change is measured solely on the basis whether a mechanism is established. There is a move away, e.g., at the UN, from a mechanism focused fight against impunity to looking more at the

⁵³ See e.g. the work of Pablo de Greiff around a systematic approach to prevention, <https://chrgi.org/focus-areas/prevention/>; or the work of ICTJ on the contribution of TJ to prevention: <https://www.ictj.org/publication/transitional-justice-and-prevention-summary-findings-five-country-case-studies>. The work of GAAMAC on atrocity prevention can also be mentioned here: <https://www.gaamac.org/>, as well as the work of the Auschwitz Institute for the prevention of genocide and mass atrocities: www.auschwitzinstitute.org.

function/role a certain mechanism or process can play in ensuring accountability, including the prevention of atrocities. The advantage of an Observatory that would focus on functions (e.g., how can a criminal investigation lead to building trust in institutions, how can a reparation programme change underlying gender inequalities) is that it will most likely be more targeted in finding ways to make a difference on the ground. This can be at some stage criminal prosecution or the threat thereof, and investigation by the ICC, triggering the sanction regime of the EU or other tools such as reform, diplomatic pressure, as well as mediation. The importance here is not the mechanism (output) but more the function that can lead to a certain concrete outcome that assists the fight against impunity, e.g., reforms are undertaken to change criminal justice system, information is released on missing persons that can bring closure to families, civil society laws are changed to allow for more civic space. These outcomes are what victims are demanding and the frustration is high that they don't see it, because often the most difficult approach criminal justice is chosen as the 'only' way in the fight against impunity. The positive side effect of taking a more functional approach to the fight against impunity is also that 'old' conflicts between criminal justice and the field of transitional justice will become redundant. Overcoming unhealthy territoriality and righteousness on what works and to look more on what can lead to change and seek to put measures in place to move towards achieving this change. Unhealthy competition and duplication could also be avoided through such an approach, where everyone can play, and should play their role, but more coordinated and strategic. A positive example is the EU protect defenders network, that aims to improve the situation of Human Rights Defenders (HRD) not through a mechanism focused approach but more to look at what different skills (roles) can make a difference at a given moment to protect HRD. This functional approach has brought real visible impact and avoided competition among the various NGOs that have different mandates/objectives.

Also focusing on a specific mechanism in the fight against impunity risks to lead to the earlier described closed thinking: things are done for its own sake. Such a thinking loses the ability to question why and for what purpose the fight against impunity is pursued. Linked to a narrow focus on core crimes there is a risk to constantly race to the top and present situations too quickly as crime against impunity or genocide (or to wait too long before action is taken to prevent so a genocide is actually happening), which creates political indifference, but also can lead to missing important opportunities to find political solution and to stop it early one. The downside of a functional approach is that it contains the risk, given the vast field of impunity,

that a future Observatory will seek to do everything and thereby achieve nothing. Here clear criteria can help to draw the line, but also to keep and support individual roles (e.g., litigation, reparations) but to keep them together under one strategic umbrella that aims to bring some change on the ground. But there will always be some risks left. To ameliorate the risks would mean to work with new partners (e.g., with the grassroots) together with old partners. There are also academic institutions that focus more on functional approaches, such as the NYU base centre for international cooperation, or the OHCHR, also on the ground most domestic NGOs would take a more functional approach to look at what can work in difficult context to support impunity; CSVR, CEIJL but also Impunity Watch could be new and good partners in that. Gathering these actors also within the framework of an Observatory could be envisaged. In sum, the definition of scope will be crucial for an Observatory. There is an added value to not rely immediately on the familiar and focus on Rome Statute crimes only. Also, the mechanism focused approach practices within the traditional EU partners in the fight against impunity needs to be questioned from the perspective of making change and thus having impact. The risk is high here to duplicate existing work, and to fail on providing impact through change on the ground. Taking a functional approach could push an Observatory more to cooperate with domestic actors and networks. There is, of course, the risk of being too broad, to need more capacity, to extend partnerships beyond trusted partners, and also workability/feasibility. This risk could be overcome through clear engagement criteria, focusing on systematic violations only, and planning long-term and more strategically to achieve change. As a baseline for thinking

about the scope of a future observatory: do not broaden the thematic scope beyond what the instrument can effectively tackle.

Possible criteria for engagement of an Observatory to focus and to ensure impact without duplicating existing work in the fight against impunity.

- Serious Human Rights Violations or abuses have taken place, or there are strong indications that they are taking place
- So far ICC not involved through a proper criminal investigation and no involvement of UN investigative mandate yet
- Lack of cooperation by respective government
- Need for information/monitoring is high; risk of information gets lost
- Independent domestic efforts by local civil society in monitoring the situation
- Broader strategy/evaluation in place that enables targeted intervention that are promising to create some change
- Monitoring and follow up capacity is ensured
- Situation is corresponding to EU foreign policy agenda of fighting impunity

POSSIBLE ACTIVITIES THAT COULD BE UNDERTAKEN BY AN OBSERVATORY

Building on what has been elaborated so far there are three areas that could be potential activities of an Observatory, and that came out of the interview and consultation process. The activities proposed should mutually reinforce each other and are connected to the goal to strengthen the EU's efforts in fighting impunity. Under each activity different approaches might be possible, each having their *pros* and *cons*. Visibility is important so to focus on more than one activity might be wise so if there is less progress in one there can still be progress in the other. Under each activity more targeted activities can be chosen to keep focus and ensure impact. The 3 listed activities are set out in no specific order or priority, while the gathering of information (activity 1) has been expressed as an area where the needs are the highest. Finally, there is, as was expressed by civil society actors, to maintain a strong advocacy approach to whatever activity the Observatory is chosen to do in order to strengthen the fight against impunity.

ACTIVITY 1: GATHERING OF INFORMATION TO SUPPORT ACTION IN THE FIGHT AGAINST IMPUNITY

The interviews with the various actors have shown that there is overall support for an Observatory to have some form of information gathering function. Most interviewees noted that there is enough information available and that the challenge lies in channelling this information, and advocating for, to achieve concrete action in the fight against impunity (e.g., starting a criminal investigation, supporting the creation of reparation programmes, setting up of a body that coordinates the search for missing persons, issuing sanctions to achieve reform). The question for a future Observatory will be where it can have the biggest and lasting impact. Building on what has been mentioned before on the scope, if the decision is taken to create an Observatory with a narrow scope of only looking at ICC core crimes and supporting criminal investigations and prosecutions then the Observatory will need a strong investigative capacity. There was overall hesitation by those interviewed to creating a repository that contains actual evidence. The issue here are the high costs and resources, the IIM for Syria, covering just one situation, has an annual budget of around 18 million USD and a staff of over 70 highly specialised experts. For a global mandate the costs would be astronomic. It would also duplicate existing structures especially work by the UN around Commission of Inquiries, but also potentially the ICC and by domestic prosecution efforts. To support the latter institutions especially in its efforts to create effective repositories that can help the fight against impunity in

the long run would give better returns on investment. There is also a problem of sharing of information due to different mandates, consent issues, lack of effective procedures, competition and often lack of trust. This is especially the case when it comes to very sensitive information, such as potential evidence. There are, however, efforts to work on mechanisms and approaches to improve the sharing information to achieve a common or even multiple goals (see actors mapping).

An observatory could, however, play an important function in connecting different information gathering actors and channel the information to the push for action. This is possible within a narrower scope of activities (focus on ICC core crimes) and within a broader scope (focus on serious human rights violations). Within a narrower scope there are strong existing civil society networks in strategic litigation that are familiar with each other's work, have experience in cooperating, often connecting domestic efforts with international actions (e.g., UJ cases, or bringing cases before UN HR mechanisms or international courts and tribunals). An Observatory could be built around the existing work of such networks and support them to be strengthened and more effective. The downside of supporting only such efforts would be: blind-spots since these networks focus predominantly on civil and political rights violations; the mechanism focused approach of such networks that lacks strategy in bringing real change on the ground (e.g. a conviction in a criminal case does not equal change); issues of follow up (most of strategic litigation networks follow the evidence); critiques also see that these networks are composed of western lawyers and the link to the ground is often, with some exceptions, not as solid and long-term as presented. Focus on criminal justice only, also comes at the expense of other TJ mechanisms, such as documentation for reparations, as cases such as South Sudan shows. Having said that, the experience of organisations that work on strategic litigation is of high value and their work is highly professional, hence, would need to be embedded in an Observatory.

There seems also an urgent need for information that is directly used in political processes. This information can be used by decision-makers and can lead, if its comes timely and is trustworthy, to concrete actions, which is a key demand by civil society that works on the fight against impunity. Here the recent developments at the EU and the establishment of the EU Human Rights sanction regime are of utmost important especially for a future Observatory. There is a strong need for independent and timely information by decision makers. Without such information there is a risk of politicisation and abuse of the sanction regime, as well as the risk

to feed into the claim of double standards that are often used by those that are targeted by the sanction. Solid, rightly available and accessible information could help a political decision-making process to be targeted and operate based on facts. To consolidate information and present possible options of action, including sanctions, does not exist yet within the EU. There are interesting experiences with the Global Magnitsky Human Rights Accountability Act where cooperation by civil society around US sanctions is more institutionalised.

An Observatory could also gather information that can be used to avoid that a human rights situation escalates. There is no need to wait for a genocide to happen before information can/should be shared. There is a need to channel information to prevent violations which would ultimately serve the purpose of the fight against impunity. If a more functional approach is chosen for the Observatory, one, as presented before, that looks at different policy tools and measures that can play a transformative function in the fight against impunity, information gathering would need to be strongly linked to monitoring the situations on the ground. There are existing mechanisms one can draw on, such as information collected the UN but also by civil society, as well as open-source information. Collecting, processing and sharing of information for such a purpose would be easier and less sensitive. A database to consolidate such information is less costly, also the information could be searched more targeted and come from existing databases. What this information gathering approach would need is resources and skills that are beside legal, more political and analytical in nature, focus on data-collection and analysis, include evaluation tools on comparative experiences on what has worked and what not etc. Strong regional networks would be important to have a broader reach. The downside of such a focus would be that some of this would need to be built from scratch, but as mentioned before there are some university institutions that could be part, as well as existing regional NGOs networks. Such an approach would need a strong and interdisciplinary advisor board. The strategic and targeted vision of such a model to gather information would, however, be interesting from the perspective of change and concrete outcomes. It would also hold decision makers, including within the EU, more accountable, since such an approach requires their actions.

Would NGOs buy into this activity 1 (information gathering) as potential partners? While to answer this question would require further outreach but from the first round of discussions with civil society actors, EU continues to be seen as a community of values that can make a difference

in the fight against impunity if it takes political action. This provides an incentive for the sharing of information and for engagement in the project of establishing an Observatory. Also, the current stalemate in the fight against impunity will be an incentive to cooperate. It is very important also symbolically to have an Observatory supported by the EU, while also acknowledging that there are already existing structures that need to be supported, especially in the area of advocacy. Complementarity is a guiding principles that should inform the creation and operations of an Observatory, while the ultimate goal should be to make a sustainable and meaningful difference in the fight against impunity from the perspective of the victims.

ACTIVITY 2: CREATE AND ENTERTAIN A KNOWLEDGE PLATFORM ON DOMESTIC EXPERIENCES IN THE FIGHT AGAINST IMPUNITY THAT WILL ENABLE TO CONNECT AND SUPPORT

The gap analysis in this report shows a lack of discussions on the fight against impunity that go beyond respective silos. An Observatory could take on this role to be a more permanent platform where comparative experiences are shared, dilemmas in the fight against impunity are openly addressed and knowledge is more systematically made available both online and offline. Such a platform would have the advantage to create visibility and make the EU a place where state of the art debates on combating impunity are taking place. It could promote the EU as an agent of change in the fight against impunity. Similar experiences with European Institute of Peace (EIP) show the added value to have regular debates and a dedicated institution that promotes this. The key function of the Observatory to gather information will also enable it to be a great resource of data and experiences in the fight against impunity that can also be used for advocacy. Partners of an Observatory will likely have a great network and will be able to support a strong convening power of the Observatory. Linkages to existing initiatives such as the EU Day against impunity can be established to also make connections between the external dimension represented by an Observatory with EU internal efforts, such as in the framework of the Genocide Network.⁵⁴ The platform could also have an important function to amplify voices of victims. This could be done through bringing individual voices of victims and their demands to

⁵⁴ Several recommendations on bringing closer EU's external and internal dimension of the fight against impunity are available in conclusions of the 4th EU Day Against Impunity, available here: https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2019-Fourth-EU-Day-Against-Impunity-Report_9981-19_EN.pdf

be heard, as well as to assess together with victims on what has worked on the ground, what has brought change (sounding board). This will enable the Observatory to also have a global reach by also focusing on situations that might not have the current political priority (e.g., through an annual report on the global fights against impunity).⁵⁵ Based on this the Observatory could have a strong function in supporting victims and grassroots work and make a difference for them. There are important examples for this such as the EU funded project in CAR (Colombia University), but also by other actors such as the Refugee Law Project in Uganda, CSVR in South Africa, Youth Initiative for Human Rights in the Western Balkans or Impunity Watch in Burundi, Syria, and Guatemala, the GSF's work on reparations, as well as by groups such as Namati that could be tapped into and be integrated in the knowledge platform of an Observatory. Working with organisations that have strong grassroots networks could be essential. OSJI has long-term experiences also working with the grassroots.

As part of the knowledge platform the Observatory could also directly support the work of domestic civil society in the fight against impunity. Flexible funding schemes and sub-contracting would be important, especially in supporting victim's networks. To work around specific events, sensitisation and approaches that link grassroots better to policy maker could be a role the knowledge platform of the Observatory could play. The Observatory could when engaging in policy discussions function as a broker for victim participation and can act as a sounding board on what works and what not.

There are not many drawbacks in this function. Such a knowledge platform does so far not exist. Knowledge platforms are so far rather ad hoc or very specialised. The European dimension makes sense, since the EU is seen as a credible and trusted partner in the fight against impunity, especially by civil society. It requires resources but not massively. What is necessary is a good coordinator for such a platform with existing networks and structures, as well as a well-designed data management structure, as well as communication expertise. For grassroots support a

⁵⁵ The annual report should build on existing structures and work. For example, several NGOs are producing annual publication "Universal Jurisdiction Annual Review". This publication is drafted by TRIAL, Redress, ECCHR and other NGO partners. See the annual report of 2020: <https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/>

technical advisory panel could be established that selects work to be supported through some seed-funding. Some of the work on a knowledge platform could be done through partners of the Observatory or a dedicated Secretariat. The goal is to complement existing work and not to duplicate. The more web-design and data management can be done through IT developers. This all will depend on the decision on what kind of governance structure will be chosen.

ACTIVITY 3: CAPACITY BUILDING AND TRAINING IN THE FIGHT AGAINST IMPUNITY, WITH A SPECIFIC FOCUS ON THE EU'S ROLE

An Observatory could engage in capacity building on the fight against impunity. There are needs especially by local civil society, but also within the EU institutions. Focus with local civil society could be on how EU decision making takes place and where entry points could be found for advocacy, documentation, monitoring and sharing of information, as well as enhance the capacity around fund-raising. The field of fighting impunity is extremely 'extractive' and often building capacity is only an afterthought, so there is still a huge need in different context. Some NGOs and as well as academic institutions, and other actors, are already engaged in capacity building and technical support around how to investigate, monitor and search open-source data, as well as on forensic investigations, but also on the link between prevention and transitional justice, or other more thematic issues that can be useful and tapped into by an Observatory through partnerships and finding ways of cooperation.⁵⁶ Partnerships with global south networks will be important to have a good reach and identify those groups that are in need for capacity building. The Observatory could entertain a sort of a grassroots mentorship programme where ongoing needs for capacity are addressed. This could be more effective to ensure continuous support than the usual one-off workshops. Here again the main downside could be additional resources, but most of the capacity building work could be connected to partners. FIDH, the CICC, as well as ICTJ have long-term experiences and a global network. Also, Impunity Watch which supported the creation of INOVAS would have some expertise on working on

⁵⁶ See for example the important work of Bellingcat on open-source investigations, Institute for International Criminal Investigations, Justice Rapid Response, CEPOL and EJTN in cooperation with the Genocide Network. On the link between prevention and the fight against impunity the work of the Auschwitz Institute for the prevention of genocide and mass atrocities should be highlighted as well as frameworks such as UN Framework of Analysis of Atrocity Crimes which provides risk assessment tools in order to prevent atrocities.

capacity building with victims groups. A geographically balanced approach will be important. Challenges might be language capacity, but with modern technology this could be easily overcome.

The Observatory could also engage in capacity building with staff of EU institutions. Some work is already done by the EU TJ facility and cooperation could be envisaged, also given the limited resources of the facility and the focus on operational support. Also, the existing work of other established institutions in the area criminal investigation should be taken into account.⁵⁷ As has been demonstrated in the analysis of the challenges, however, there are real needs for capacity with decision makers also given the complexity of the fight against impunity. In case a more functional approach is chosen for the scope of work of an Observatory, the connections between the fight against impunity and other interventions could be emphasised in trainings. Possible entry points for the fight against impunity could be elaborated and the role the EU can play in moving action forward. More capacity building would help to avoid misinterpretation and improve informed decision making on the ground and in Brussels. It would also bring the Observatory and the EU institutions closer together and affirm trust. The expertise for such capacity building could be drawn from the partners of an Observatory. Given the importance of making connections in the fight against impunity, partners should, therefore, come from different areas of the fight impunity (interdisciplinary group of partners). The Observatory together with EU institutions could work on identifying good opportunities where and when such trainings could take place. The development of tools and manuals could be envisaged. Drawback could be time and resources for such capacity building. To save time capacity building could be integrated in existing trainings. Incentives could be provided by EU institutions for staff to participate. Trainings should however be practice relevant and could also target specific delegations or desks that are more faced with questions that are relevant for the fight against impunity. As stated before, building on the work of the TJ facility and the already ongoing work of other actors will be important.

⁵⁷ Ibid.

FIRST IDEAS ON THE QUESTION OF OPTIONS FOR THE GOVERNANCE STRUCTURE OF AN OBSERVATORY

Form follows functions. The governance structure of a future Observatory should be built around the activities that are chosen for it. What follow are, therefore, only some first ideas on what questions to consider when thinking about a governance structure. A detailed analysis of a governance structure has to await a decision on the activities/functions of a future Observatory, as well as the outcome of an engagement with those, most likely civil society, that will operate such an Observatory.

The goal should be to equip the Observatory with the necessary tools available to fulfil these activities that are geared towards contributing to change on the ground (e.g., as suggested before through better information; better connection and better capacity). What change means will of course vary from context to context. As an Observatory that will be supported by the EU, it will most likely have privileged access to EU decision making processes, which gives it an important edge. How the access and connection with the EU institutions will look in practice has to be well thought through. The need for such a connection was emphasised especially from the perspective to bring about concrete action and change, but also issues of independence of the work of civil society were raised.

As mentioned before the funding instrument of the European Commission that will support the creation of an Observatory provides already some parameters on what will be feasible. The focus is on supporting the fight against impunity in third countries, outside the EU. Many interviewees, including representative from the Genocide Network, emphasized the important link between external and internal work on impunity, that it cannot be neatly separated. An Observatory, while focusing on external affairs, can still indirectly contribute to coherence between internal and external work. Sharing of information and coordination, for example, with the Genocide Network could be a possible first step. The Observatory could be an associate to the genocide network.⁵⁸ Also, a possible activity of the Observatory, the knowledge platform,

⁵⁸ Please note that the Genocide Network is dedicated to facilitating investigation and prosecution of core international crimes at national level, in MS, while connection and granting associate status would depend on the role, tasks and mandate of the Observatory.

could include European experience in the fight against impunity without doing actual programming inside the EU.

Since the funding for the Observatory is geared towards activities outside the EU institutions, no funding can be provided for extra staff within the EU Institutions under this funding instrument. An Observatory will thus take very likely the form of an external entity. There are various options, but one idea that has been mentioned the most is the creation of an NGO Consortium that takes the lead within an Observatory. This idea seems to have some support within the EU institutions. Interest was expressed by various civil society organisations to participate in such a project, while stating that they would need to see the details; there was strong interest in further shaping the exact nature of the mandate of such an Observatory. There was also concern expressed that the Observatory would be established in replacement of ongoing efforts by civil society around advocacy. The activities listed before could give a first indication on the functions such an Observatory could have: information gathering for action; providing of a knowledge platform and capacity building.

The advantage of a consortium is that it is a familiar structure to civil society, but also to donors and decision makers. There are examples of other consortia and networks which are listed in the annex of this study. Working together is also common in the area of strategic litigation, support to the ICC and among victims and grassroots networks. The issue in the fight against impunity is that there are CSOs with very different mandates and often strong ideological differences. One idea is therefore to stay rather with a very narrow focus of an Observatory, e.g., support a Consortium that works on the ICC, here existing structures such as the CICC could be supported, or support CSOs that engage in strategic litigation. There is, however, the risk not to meet the target of contributing to change on the ground. A suggested functional approach of an Observatory could be the binding glue allowing different CSOs to play their different roles in the fight against impunity but under one umbrella structure that can 'play' different functions depending on contextual needs and opportunities. This would be unique and could prove effective in making a difference in the fight against impunity. Such an approach could also enrich the information gathering function and make it more usable for decision making processes that are geared to make a difference on the ground. As was expressed during the consultation fostering 'ecosystems' of collaboration "rather than clubs of the already converted" were

considered as ultimately be crucial for effectiveness. Many emphasized the inclusion and participation of victims and survivors in the work of a future Observatory.

For such a functional approach some membership criteria could be developed to ensure clarity and predictability for participating CSOs. Some first ideas for criteria could be: strong network and reach, committed to the fight against impunity and its core business in providing accountability; expertise on various measures that can support accountability (e.g. criminal justice, reparations etc), strong expertise around monitoring and gathering information that support the fight against impunity; expertise around victims participation; as well as strong familiarity with policy and decision making, including at the EU; regional expertise and gender expertise. These criteria will not need to be fulfilled by each member, but the membership should reflect these different areas of expertise. The interdisciplinary nature of the fight against impunity was emphasised during the interviews. There was a keen sense by some interviewees that legalistic approaches are not enough to combat impunity, there is a growing need to investigate structural issues as well as consequences of impunity, here especially CSOs that work on gender issues, but also victims group call for MHPSS approaches that complement narrow focuses on prosecutions only. They are more victims centred and sustainable. Such approaches could be also reflected in the membership of an Observatory.

As for a Consortium that pursues a more functional approach to the fight against impunity, the downside is that not one NGO is currently doing this. Hence, as a next step there would be the need to define well the membership criteria and create a process that brings together a group of CSOs that feel ready to work together. Expertise is there but it has not been connected yet. This could, however, also be seen as an opportunity. A sort of small coordination entity, e.g., a secretariat that coordinates and assists in channelling the information to trigger political action, as well as legal action would most likely be essential to make such a consortium work. The idea of a secretariat is familiar to CSO consortia, the secretariat can either be placed within a CSO member (e.g., Belarus Accountability Platform) or established separately as its own legal entity (e.g., EU Protect Defenders network).

The size of such a consortium that brings together various mandates under one umbrella should be still manageable. Experiences from other comparable consortia show that there could be a smaller steering committee that is responsible for the operational work. The substantive guidance could come from a broader group of civil society that play an advisory function. Given

the complex nature of the fight against impunity an advisory board would be essential. A smaller technical advisory panel, that could take a regional or country formation, could be established that advises on projects proposed to be funded through the Observatory, in case the Observatory is giving such a function. Some CSOs, independently, mentioned the idea of a fund that could be connected to the Observatory. The fund would support projects and CSO work (including grassroots work) in the fight against impunity. The advantage of a fund is that it would give the Observatory some teeth, but also limit competition around funding. This would be a more democratic way of distributing funds. It would also enable to support smaller grassroots work through sub-granting. The fund could be connected again to a technical advisory panel that makes the selection of projects.

Independence is a key issue to consider for an Observatory that is run by civil society, especially when the purpose of the Observatory also includes advocacy. Most of the comparable CSO consortia have their independence, there are no government representatives within the governing structure (e.g., protect defenders network). There are, however, exceptions, such as the Global Survivors Fund which has government representatives being represented in the board. The same applies to EIP and Justice Rapid Response. In the case of the Observatory there will be a strong link with the EU through funding but also political support and action. The Observatory can also play an important function in enriching and professionalising the work of the EU on the fight against impunity, through information sharing, capacity building and connecting knowledge for grassroots experiences. Ways need to be found on how to manage this relationship and in how far EU institutions and EU MS should be represented in the governance structure of the Observatory. There is a risk in political interference in the work of an Observatory, given especially the high stakes in fighting impunity, there are however also opportunities to have the Observatory as an EU policy tool in the fight against impunity. Further discussions need to be led when the mandate of an Observatory will be discussed. In the discussions risk and opportunities need to be carefully weight.

To avoid duplication and interference in the work of existing structures, clear engagement criteria could be developed that make the work of the Observatory predictable but also fill gaps that others are not addressing, or not yet addressing. (Please see some suggestions before in the section on the scope.) The Observatory should, however, have the potential to move the debate and action around the fight against impunity forward in creative and effective ways. The

vision here could be that and Observatory is working early on after violations have been taken place or also play an alert function to prevent violations of escalating. As soon as there is cooperation by a state, or a credible accountability mechanism is established it could move more into a complementary role supporting ongoing efforts.

There are other options than an NGO consortium or a specific fund, such as supporting existing structures, e.g., the OHCHR, civil society that works on ICC, strategic litigation CSOs. This structure should continue to be supported, but there is room for a complementary mechanism that fills the gap in coordination and capacity, strategically linking existing information to decision makers to make a difference on the ground, addressing the fight against impunity more comprehensively and this effectively through a functional approach and establishing stronger links with regional networks in the global south.

WAY FORWARD/NEXT STEPS

The purpose of this study was to provide first options and ideas for the establishment of an Observatory that supports the global fight against impunity. The study will stay away from providing recommendations or preferences on one or the other model. The ideas presented in the study are however guided by experiences and identified gaps that need to be addressed in order for the support in fighting impunity to be meaningful and have concrete effects on the ground. There seems concrete political will among the EU institutions to go beyond a mere project support to the fight against impunity. This is rare and this opportunity should not be wasted.

The study, given the timeline and resources, can only be a first step towards the establishment of an Observatory. Verification of its suggestions and ideas, as well as further consultations, including with grassroots organisations, will be needed to sharpen the mandate of an Observatory. A small group of experts, familiar with the field of fighting impunity and composed with expertise from different fields and experiences could in a next step design the mandate and governing structure of such an Observatory in close consultation with the relevant EU Institutions and civil society. It will be important to set the right tone from the beginning: one of inclusion, expertise, and coordination.

BACKGROUND INFORMATION

Partner country

Multiple

Contracting authority

European Union, represented by the European Commission.

Current situation in the sector

The *Treaty on the European Union* (TEU) states in its Article 2 that “The Union is founded on the values of **respect for human dignity**, freedom, democracy, equality, the **rule of law** and **respect for human rights**, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, **justice**, solidarity and equality between women and men prevail.”

In its Article 3 para 5, the TEU stipulates that “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall **contribute to peace**, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the **protection of human rights**, in particular the rights of the child, as well as to the strict **observance** and the development **of international law**, including respect for the principles of the United Nations Charter.”

In turn, Article 21 para 1 provides that “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the **rule of law**, the **universality and indivisibility of human rights and fundamental freedoms**, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” Para 2 of Article 21 sets out that “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (...) (b) consolidate and support democracy, the rule of law, human rights and the principles of international law.”

The *EU Action Plan on Human Rights and Democracy 2020-2024*, under its Priority 1: ‘Protecting and empowering individuals’, sets the ambition to **close the accountability gap, fight impunity and support transitional justice**. In specific, the Action Plan undertakes to:

(...)

b. Develop comprehensive EU approaches to ensuring accountability, in particular for the most serious crimes and human rights violations and abuses, and to supporting victims in seeking remedy by linking national and international efforts, building on EU policies, e.g. on the International Criminal Court, children and armed conflict, Women, Peace and Security, survivors of conflict-related sexual and gender-based violence, transitional justice, the fight against torture and other ill-treatment.

(...)

e. Support in-country initiatives to combat impunity for human rights violations and abuses and transitional justice processes, including by strengthening links with the UN.

(...)

f. Actively promote measures to prevent enforced disappearances and extrajudicial killings.

g. Promote continued political commitment to and operationalisation of the Responsibility to Protect (R2P) by facilitating dialogue and engagement in the UN context and by applying the concept as an analytical tool to specific country situations. Prioritise EU's early action to prevent mass atrocities.

The draft MIP for the **thematic programme on human rights and democracy** states: *Supplementary funding from the NDICI-Global Europe cushion shall be devoted to fight impunity, by building the knowledge base for accountability. To be sustainable, accountability efforts must be nationally owned by all those directly concerned, including local and national civil society organisations working on human rights and democracy. Civil society actions shall respond to the lack of sufficient legal or factual evidence of human rights violations and abuses, which de facto derails the proper functioning of the criminal justice system and fuels a climate of near-absolute impunity for perpetrators. This shall require setting up specialized inquiry structures and developing comprehensive strategies and tools to address knowledge, capacity and commitment gaps, whenever and wherever they occur.*

Over the past years, there has been a sharp increase in human rights violations and abuses, including during conflicts, in many regions and countries around the world. The lack of/weak accountability for these violations and abuses is one of the biggest challenges the international community is currently facing. Impunity constitutes a denial of the right to truth and justice, and the right to effective remedy, encompassing full and adequate reparation for victims and guarantees of non-recurrence. The fight against impunity represents a critical element to return to the path of peaceful dialogue, social reconciliation, peaceful coexistence, and inclusive and sustainable development.

Insufficient objective and reliable information, including legal or factual evidence, of human rights violations and abuses contributes to impunity for perpetrators and hinders the proper functioning of the criminal justice system.

The EU is guided in its endeavours by international human rights and humanitarian law. It aims at responding to the need for independent and evidence-based assessments of human rights violations and abuses whenever and wherever they occur. The recent adoption of the EU global human rights sanctions regime is a sign of the EU's determination to take action towards accountability.

In 2020, the European Parliament put forward a proposal for a pilot project (PP) for the creation of a **European Observatory on the Fight Against Impunity** (EOI) in order to '*promote the fight against impunity for serious violations of human rights and crimes against humanity*'. A study was also carried out by the European Parliament titled: *State of play of existing instruments for combating impunity for international crimes* (EU, August 2020). Keeping in mind that the scope of the EP's proposal and related-study is limited, the main findings and recommendations of the study should be taken into account.

The European Commission is currently exploring the idea of supporting an Observatory that would build upon this PP proposal. This Observatory could be a structure independent from the EU and could have the following responsibilities and tasks:

1. Monitor the human rights situation in a given context and document human rights violations and abuses, in close cooperation with local, national, regional and international bodies and mechanisms. This includes documenting diverse sources of information;
2. Analyse contextual information and other evidence and produce reports with a view to contribute to establishing human rights violations and abuses, including those which are underreported or receiving less attention from the authorities and/or the international community, and identifying those responsible for, involved in or associated with human rights violations and abuses;
3. Advocate for reparation processes and provide legal services to victims of human rights violations and abuses;
4. Participate in advocacy for the adoption of relevant legislation enabling the fight against impunity;
5. Provide training to local and national legal actors to enhance local capacity building and access to justice;
6. Establish partnerships and networks at local, national, regional and global levels to raise awareness and knowledge about human rights violations and abuses, and to foster evidence sharing and cooperation among different actors.

A scoping and identification study, starting with identifying needs and gaps and mapping of existing activities and actors, is an essential pre-condition to assess the value added and feasibility the above support to an Observatory and to inform the most effective course of action.

Related programmes and other donor activities

The Commission is currently supporting/has supported in the past the following actions :

- Actions under the Instrument contributing to Stability and Peace (IcSP), e.g.:
 - CAR: Advancing Reconciliation and Accountability through Forensic Investigations in the Central African Republic (Forensic Investigations)
 - CAR: Appui à la consolidation de la paix, la réconciliation nationale et la résolution pacifique des conflits en RCA (CVJRR).
 - CAR: “Projet conjoint d’Appui à la Cour Pénale Spéciale de la République centrafricaine (CPS).
 - DRC: Phase 2 - Appui aux cellules de poursuite (Military Courts).
 - Global: Gender-Sensitive Transitional Justice (UN Women)
 - Iraq: Assistance in Accounting for Iraq’s Missing and Disappeared Persons (International Commission Missing People).
 - Guinea: Soutenir la participation des victimes au procès du 28 septembre en Guinée (Massacre 28 Sept 2009).

- Niger: Programme d'appui au traitement judiciaire et au processus de réintégration des ex-combatants de Boko Haram (Community based Boko Haram integration).
- Nigeria : Demobilization, Disassociation, Reintegration and Reconciliation: conflict dissolution and peacebuilding in North-East Nigeria (Boko Haram integration)
- Colombia: Strengthening the institutional capacity of the Ombudsman's Office for the promotion and protection of the human rights of communities within the framework of the implementation of the Final Peace Agreement (Supporting the Ombudsperson)
- Colombia: Towards Reconciliation and Peacebuilding: Reintegration of Girls and Boys of the FARC (Reintegration of minors)
- Colombia: Local Justice for Peace in the context of the Colombia Government's Rapid Response Strategy (Local Justice for Peace)
- Lebanon: Special Tribunal (STL).
- Syria: Supporting the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (IIIM).
- Syria: Supporting the Governance, Administrative, and Analytical Functions of the Commission for International Justice and Accountability, Contributing to International Security and Justice in Syria and the global pursuit of justice for the victims of war (CIJA).
- International Security and Justice in Syria and the global pursuit of justice for the victims of war (CIJA).
- Syria: Laying the foundations to account for missing persons in Syria.
- Actions under the European Instrument for Democracy and Human Rights, e.g.:
 - Parliamentary Campaign for the Ratification and Effective Implementation of the International Criminal Court Statute and the Promotion of the Rule of Law – implemented by the Parliamentarians for Global Action.
 - Support to the International Criminal Court (ICC)
 - Support to the Coalition for International Criminal Court (CICC) (EIDHR/2017/388-528): A project supporting the CICC and the Nigerian Coalition for the International Criminal Court. The project aims to reduce impunity for genocide, war crimes and crimes against humanity is reduced by mobilizing global civil society to advocate for the fair, independent, and effective functioning of the International Criminal Court and a universal Rome Statute system of international justice.

- Support to the OHCHR
- Support to the Inter-American Court of human rights (EIDHR/2018/402-057)
- Support to the Inter-American Commission of Human Rights (EIDHR/2018/402-055)
- Actions under other funding sources:
 - The Global Fund for Survivors of Conflict Related Sexual Violence created in October 2019, action on the Reparations and redress for victims of conflict-related sexual violence.

More detailed information in relation to some of the above projects will be shared by the project manager in INTPA G1 at the beginning of the assignment.

OBJECTIVE, PURPOSE & EXPECTED RESULTS

Overall objective

The overall objective of the project of which this global price contract will be a part is as follows:

To produce an analysis of the current situation of the fight against impunity, its gaps and needs for strengthening. Explore, outline, and assess the options for activities and scope of focus of a potential support to an Impunity Observatory, which would contribute to combatting impunity globally.

Purpose

The purpose of this contract is as follows:

To produce a study analysing the current state of play of combatting impunity and exploring the potential option to establish an Impunity Observatory through which the EU could strengthen its contribution in countering impunity. Taking into account existing (EU) bodies, mechanisms and activities in this area, the study should outline various options and analyse their advantages and disadvantages, added value and resource input.

Such an observatory should not become an EU agency, have any EU formal status nor form part of EU bodies.

This should be achieved through:

- i)** Identifying the root causes of impunity, the challenges faced and best practices developed when fighting it.
- ii)** Mapping of existing actors, mechanisms, and projects combatting impunity for the most serious crimes.⁵⁹ Collecting information from the relevant stakeholders (i.e. officials in the European Parliament, DG INTPA, FPI, JUST and EEAS, the European Genocide Network, EU Special Representative for Human Rights, Member States representatives, representatives of CSOs working in the area, international/regional human rights mechanisms,...). The project manager of INPTA G1 will provide a list of specific actors to be interviewed which will be further adjusted in cooperation with the expert throughout the elaboration of the study based on information collected by the expert.
- iii)** Identifying and laying out options of the potential mandate, scope of focus and activities of an Impunity Observatory supported by the EU. Assessing the costs, benefits and added value of each of the options laid out.

Results to be achieved by the contractor

Part I. Identification of challenges, best practices, actors, & mechanisms

- **Result 1:** Provide an analysis of the challenges faced in combatting impunity for serious human rights violations and best practices developed relying upon interviews and round tables with actors involved in ensuring accountability as well as desk research. (max 15 pages)
- **Result 2:** Identify actors and mechanisms involved in the fight against impunity **not included in a study produced at the request of the European Parliament (EP study)**⁶⁰ and their activities and links between them. (max 15 pages)
 - Activities of CSOs at the Member States', EU and global level (always related to developments in third countries), such as evidence collection, advocacy, strategic litigation, and capacity building.
 - Member States' funding of CSO projects addressing impunity.
 - UN bodies and mechanisms, other international and regional organisations involved in the fight against impunity – a brief overview of those **not included in the EP study** and analysis of their cooperation links with CSOs.

Part II. Identification of options for the scope of focus & activities of an Impunity Observatory

- **Result 3:** Building on the identified challenges and gaps, best practices, actors and mechanisms, **identify:**
 - Options for the possible **scope** of human rights violations which this action would concern and assess the costs, benefits and added value of the inclusion of each option.
 - Activities that are needed in order to tackle the challenges described and build upon best practices identified.
 - Options of the potential mandate, scope of focus and activities of an Impunity Observatory supported by the EU. Assessing the costs, advantages and disadvantages and added value of each of the options laid out (max. 20 pages).

ASSUMPTIONS & RISKS

Assumptions underlying the project

A Key Expert will be able to carry out the assignment partly remotely in view of the COVID-19 situation and partly in person, depending on the development of the present COVID-19 situation.

⁶⁰European Parliament. *State of play of existing instruments for combating impunity for international crimes* (EU, August 2020).

Risks

There are no major risks foreseen.

SCOPE OF THE WORK

General

Description of the assignment

The study (of 50 pages max without annexes) should be composed of two Parts.

Part I. (max 30 pages) will be comprised of mapping of actors, mechanisms, best practices and challenges.

Part II. (max 20 pages) will be founded on the findings which emerge from Part I. It will consist of the identification and assessment of various options for the activities and scope of focus of an Impunity Observatory.

Part I. Challenges, Best Practices, Actors & Mechanisms

- i) Identification of the challenges faced and best practices developed when combatting impunity for serious human rights violations, including its root causes.**

This section shall build upon desk research and interviews with EU officials concerned with impunity, especially in the European Parliament, the Commission (DG INTPA, FPI, JUST) as well as in the EEAS, Eurojust and the Genocide Network, and the EU Special Representative for Human Rights. Interviews with CSOs, Member States' representatives, parliamentary networks, UN bodies and mechanisms, regional human rights mechanisms, and academia should be carried out. List of actors to be interviewed will be provided by DG INTPA, Unit G1 in July 2021 and further developed in cooperation with the expert during the elaboration of the study. It should identify the main obstacles faced by actors engaged in the fight against impunity. Among others, it should focus on obstacles of judicial (e.g., barriers in evidence collection, length of proceedings), legislative (e.g., lack of enactment of certain grave crimes in the national legislation⁶¹), legal (lack of access to legal representation), political (e.g., corruption), social (e.g., lack of awareness), and practical (security issues) nature. Particular attention should be given to the needs and expectations of victims (victim-centred approach), possible via targeted surveys.

It should further identify best practices in countering impunity, including best practices developed by CSOs, which the Observatory could employ and expand.

- ii) Mapping of actors and projects addressing impunity for the above-defined crimes.**

This section of the study shall map actors and projects related to combatting impunity. In particular:

⁶¹ European Parliament. *State of play of existing instruments for combating impunity for international crimes* (EU, August 2020) 7, 82.

- CSOs' projects and activities (a non-exhaustive list of EU-funded projects and their action reports will be provided based on a mapping exercise carried out by Unit G1 in July 2021);
- Member State-funded projects and activities of CSOs;
- UN bodies and mechanisms not included in the scope of the EP study and cooperation links between CSOs and UN bodies and mechanisms engaged in the fight against impunity.
- Cooperation links between CSOs and international/regional human rights bodies and mechanisms engaged in combatting impunity.

The aim is to understand the landscape and identify possible gaps and coordination needs. The mapping should also enable to **identify potential partners**, which could form part of the Observatory, and to ensure complementarity and avoid duplication of already existing activities. Focus should therefore be on larger projects and global/major regional organisations as opposed to mapping all activities of grass root organisations.

The mapping of bodies and activities of inter-governmental organisations should serve as a base for identifying links for their cooperation with the Observatory.

Care should be taken to avoid overlaps with the content of the EP study.⁶² The EP study includes extensive information on the EU policy framework, *ad hoc* international criminal tribunals, the ICC, hybrid courts and specialised chambers in domestic courts with a mandate in international criminal justice, and UN Evidentiary Mechanisms. It also includes information on EU (and some Member States') funding provided to these bodies. Therefore, emphasis should be put on the mapping of CSOs and of projects not covered by the EP study.

Part II. Scope & Activities

Building upon information collected in Part I., this part will outline and assess various options for:

- The scope of human rights violations on which a potential Observatory could focus;
 - The activities through which the Observatory could contribute to the fight against impunity for these human rights violations.
- i) **Identification of options for the scope of focus of the EU support to an Observatory.**

This section of the study should propose options for the **topical scope** of the activities of the Observatory, taking into account the current challenges faced and best practices developed when combatting impunity. It should weigh the advantages and disadvantages of including each option. Possibilities for the topical scope include:

- a. Scope defined by the UNGA resolution on the right to remedy and reparation for victims: 'gross violations of international human rights law and serious violations of

⁶²European Parliament. *State of play of existing instruments for combating impunity for international crimes* (EU, August 2020).

international humanitarian law constituting crimes under international law',⁶³ i.e., **core international crimes** (genocide, crimes against humanity and war crimes).

- b. Scope defined for the **EU global human rights sanctions regime**⁶⁴, i.e., (a) genocide; (b) crimes against humanity; (c) the following serious human rights violations or abuses: (i) torture and other cruel, inhuman or degrading treatment or punishment; (ii) slavery; (iii) extrajudicial, summary or arbitrary executions and killings; (iv) enforced disappearance of persons; (v) arbitrary arrests or detentions; (d) **other human rights violations** or abuses, including but not limited to the following, in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU: (i) trafficking in human beings, as well as abuses of human rights by migrant smugglers as referred to in this Article; (ii) sexual and gender-based violence; (iii) violations or abuses of freedom of peaceful assembly and of association; (iv) violations or abuses of freedom of opinion and expression; (v) violations or abuses of freedom of religion or belief.
- c. **Serious human rights violations** as defined under UNGA resolution and the EU global human rights sanctions regime, i.e., genocide; crimes against humanity; war crimes; torture and other cruel, inhuman or degrading treatment or punishment; slavery; extrajudicial, summary or arbitrary executions and killings; enforced disappearance of persons; arbitrary arrests or detentions.

ii) Identification of activities which are needed to strengthen the fight against impunity, which should be undertaken by the Observatory.

Taking into account the scope defined, challenges and best practices identified and actors involved in the fight against impunity, focusing on the activities of CSOs and their cooperation with bodies and mechanisms within the EU, UN, and other inter-governmental organisations, this section of the study should examine what actions are needed.

iii) Options of the potential mandate, scope of focus and activities of an Impunity Observatory supported by the EU.

This part should outline various alternatives insofar the support from the EU to an Impunity Observatory is concerned, considering the abovementioned different possibilities of its scope of focus. The costs, benefits and added value of each outlined option should be assessed.

⁶³ As suggested by the INTPA G1 analysis referring to the [GA resolution 60/147](#) discussed at Doha Conference, [stating the](#) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

⁶⁴ COUNCIL REGULATION (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

Geographical area to be covered

The geographical scope of the study is worldwide, however, examples should be geographically balanced (subject to occurrence of impunity in each region) in order to ensure a comprehensive overview.

Target groups

European Commission; final beneficiaries will be survivors of serious human rights violations.

Specific work

The specific work will tentatively, but not exhaustively, consist of the following concrete tasks:

- Brainstorming, fine-tuning and agreeing with the project manager, within the three-month identification phase of the assignment, on the **specific steps and tasks** to undertake and their corresponding **calendar/timeline**.
- Desk-based research and collecting and reviewing the **necessary information** to complete the assignment.
- Carrying out the **interviews, consultations, and roundtables** to enquire about activities, challenges, needs and best practices with various stakeholders participating in activities addressing impunity. Specific list of stakeholders will be provided by DG INTPA G1.

Stakeholders will include but not be limited to:

- Relevant EU institutions and officers – DG INTPA, JUST, FPI; EEAS; EU Special Rapporteur on Human Rights; European Parliament; Eurojust, European Genocide Network;
- Relevant institutions and officers in EU member states;
- CSO representatives;
- Parliamentary networks,
- UN bodies and mechanisms and bodies of mechanisms of other inter-governmental organisations.

- Elaboration of a Study exploring the challenges and root causes of impunity and outlining various options for the potential scope of focus and activities of an Impunity Observatory.
- Any further task that, during the implementation of the assignment, may be considered relevant and useful by the European Commission to attain the purpose of this contract.

Project management

Responsible body

European Commission
DG International Partnerships (INTPA)
Directorate G – Human Development, Migration, Governance and Peace
Unit G.1 - Gender Equality, Human Rights and Democratic Governance

Management structure

This contract will be managed by the Project Manager within DG INTPA Unit G1 – Gender Equality, Human Rights and Democratic Governance, or by any of their hierarchical superiors of the responsible body as stated in the previous paragraph.

A steering committee composed of other thematic units in DG INTPA (G5, D2), relevant units in DG JUST (B1 and C2), and divisions in the EEAS Directorates for Human rights, global and multilateral issues (Global) will have the opportunity to provide internal key comments on the inception report, interim report and draft final report in order to improve qualitative feedback. Appointed desk officers from these units and divisions will also serve as key contact points to help the service provider find the appropriate information.

LOGISTICS AND TIMING

Location

The assignment location will be Brussels, Belgium.

Given the current COVID-19 situation, most of the work is expected to be conducted remotely, thus home-based. However, should conditions allow, meetings and consultations may take place in Brussels and the key expert's presence may be required. Any costs related to travelling to and staying in Brussels, if the expert freely decides to work home-based from somewhere else, will be borne by the key expert.

Start date & period of implementation of tasks

The intended start date is September 1, 2021 and the period of implementation of the contract will be 4 months from this date. Please see Articles 19.1 and 19.2 of the special conditions for the actual start date and period of implementation.

REQUIREMENTS

Staff

Note that civil servants and other staff of the public administration of the partner country, or of international/regional organisations based in the country, shall only be approved to work as experts if well justified. The justification should be submitted with the tender and shall include information on the added value the expert will bring as well as proof that the expert is seconded or on personal leave.

Key experts

One Key Expert is required for this assignment.

Key Expert

Qualifications and skills

- **Advanced University Degree** in Law, Political Science, or other disciplines related to human rights, international criminal law and public international law.

- Excellent command of **English, including drafting skills**. Knowledge of French and/or Spanish will be considered a strong asset.

General professional experience

- Minimum **five years** of professional experience in the field of human rights and/or public international law. (mandatory)

Specific professional experience

- Minimum **three years** of professional experience conducting research in the field of fight against impunity and/or international criminal law. (mandatory)

Equipment

No equipment is to be purchased on behalf of the contracting authority as part of this service contract.

REPORTS

Reporting requirements

The contractor will submit the following reports in English in one original:

- **Interim Report** of maximum 30 pages (excluding annexes) to be produced within three months from the start of implementation. The report should include a finalized Part I. of the Study, i.e. the Identification of challenges, best practices, actors & mechanisms. Following the submission of this report, consultations/workshop will be organized where the outcomes of the first part of the study will be presented. The concept of the second part of the study will be subsequently adapted based on these consultations before the contractor proceeds with the second phase of the Study.
- **“Living” calendar** containing the planning of tasks to be carried out throughout the assignment
- **Ad-hoc reports** on key intermediary findings, issues encountered, key interviews and consultations

Draft final report of maximum 50 pages (main text of the study, excluding annexes). This report shall be submitted no later than one month before the end of the period of implementation of tasks.

Final report with the same specifications as the draft final report, incorporating any comments received from the parties on the draft report. The deadline for sending the final report is 5 days after receipt of comments on the draft final report. The report shall contain a sufficiently detailed description of the different options to support an informed decision on supporting an Impunity Observatory. The final report must be provided along with the corresponding invoice.

Submission and approval of reports

The report referred to above must be submitted to the project manager identified in the contract. The project manager is responsible for approving the reports.

MONITORING AND EVALUATION

Definition of indicators

Ongoing monitoring and evaluation will be applied with the project manager based on their feedback and comments made by the relevant INTPA units and EEAS divisions.

Special requirements

Given the current COVID-19 situation, the vast majority of tasks are expected to be conducted remotely. The Key Expert will thus be required to carry out his/her assignment using the necessary digital tools and should therefore possess the respective licences. The organisation of online meetings, consultations and/or webinars shall be done through *Webex*, *Microsoft Teams*, *Zoom* and *Skype*.